RECORD, CASE No. 13,418.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 285.

ARTEMUS ROBERTS, PLAINTIFF IN ERROR,

vs.

WALTER F. LEWIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF ~~COLORADO~~ Nebraska.

FILED OCTOBER 27, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 5, 1891.

1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for said district of Nebraska, within the eighth judicial circuit, at the January term, A. D. 1888.

Be it remembered that on the 11th day of June, 1887, a petition was filed in the clerk's office of the circuit court of the United States for the district of Nebraska; which said petition is in words and figures following, to wit:

In the Circuit Court of the United States within and for the District of Nebraska.

WALTER F. LEWIS, Plaintiff,
vs.
ARTEMAS ROBERTS, Defendant. } Petition.

Comes now the said plaintiff and shows and represents unto this honorable court that he is a resident of the city of Milwaukee, in the State of Wisconsin, and a citizen of the said State of Wisconsin, and that the defendant is a resident of the city of Lincoln, in the State of Nebraska, and a citizen of the said State of Nebraska, and that the matters and things herein in controversy exceed the sum and value of two thousand dollars, exclusive of interest and costs.

2nd. The plaintiff further complains of the defendant, for that plaintiff has a legal estate in and is entitled to the immediate possession of the following-described property, to wit: lots No. one (1), two (2), three (3), four (4), five (5), and six (6), all in block No. forty-one (41), in Dawson's addition to South Lincoln, in Lancaster county, Nebraska, and that said defendant has ever since the 11th day of April, 1887, unlawfully kept and still keeps the plaintiff out of possession thereof.

Wherefore the plaintiff prays that he may have judgment for the delivery of the possession of said premises to him, and for the
2 costs of this action.

J. M. WOOLWORTH,
Pl'ff's Att'y.

STATE OF NEBRASKA, } *ss:*
Douglas County, }

J. M. Woolworth, being first duly sworn, upon his oath says that he is one of the plaintiff's attorneys herein, and that plaintiff *has* is a non-resident of the State of Nebraska and is now absent therefrom, and that affiant has read this petition and knows the contents thereof, and that all the facts herein set forth are true, as he verily believes.

J. M. WOOLWORTH.

Subscribed in my presence and sworn to before me this 11th day of June, A. D. 1887.

ELMER D. FRANK, *Clerk.*

Upon the back of said petition appear endorsements in words and figures following, to wit:

No. 23, M. In U. S. circuit court, district of Nebraska. W. F. Lewis *vs.* Artemas Roberts. Petition. Filed June 11, 1887. Elmer D. Frank, clerk. J. M. Woolworth, attorney for plaintiff.

Thereupon, afterwards, to wit, at the May term of said court, on the 24th day of October, 1887, the following proceedings were had in said case, as appears of record on folio 375, Journal M, of said court:

WALTER F. LEWIS
vs.
ARTEMAS ROBERTS. } 23, M.

On motion of defendant, leave is granted by the court to amend the answer herein in ten days, and plaintiff to reply in fifteen days from date.

Thereupon, afterwards, to wit, on the 21st day of Jan'y, 1888, an amended answer was filed in said case; which said amended answer is in words and figures following, to wit:

3 In the Circuit Court of the United States, District of Nebraska.

WALTER J. LEWIS, Plaintiff,
vs.
ARTEMUS ROBERTS, Def't.

Amended Answer.

1. The above-named defendant, for an amended answer to the plaintiff's —, says that he *has* for more than ten years prior to the commencement of this action *he* had been and still is in the open, adverse possession of the premises in controversy.

2. Defendant, further answering, denies each and every allegation in said petition contained.

HARWOOD, AMES & KELLY,
Att'ys for Def't.

STATE OF NEBRASKA,
County of Lancaster, } *ss:*

A. Roberts, being first duly sworn, says he has read above answer, and that facts therein set forth are true as he verily believes.

ARTEMAS ROBERTS.

Subscribed in my presence and sworn to before me this 21st day of Jan'y, 1888.

ELMER D. FRANK, *Clerk.*

Upon the back of said amended answer appear endorsements in words and figures fol-owing, to wit:

No. 23, doc. M. Walter F. Lewis *vs.* Artemas Roberts. Amended answer. Filed Jan'y 21, 1888. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 21st day of January, 1888, a stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

WALTER F. LEWIS, Plaintiff,
vs.
ARTEMUS ROBERTS, Defendant.

Stipulation.

It is hereby stipulated and agreed that the premises in controversy in this action exceeds the sum of five thousand dollars.

4 Jan'y 20th, 1888.

HARWOOD, AMES & KELLY,
Att'ys for Defendant.

L. C. BURR,
For J. M. WOOLWORTH,
Att'y for Pl'ff.

Upon the back of said stipulation appear endorsements in words and figures following, to wit:

No. 23, doc. M. Walter F. Lewis *vs.* Artemas Roberts. Stipulation. Filed Jan'y 21, 1888. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 21st day of Jan'y, 1888, instructions asked by defendant were filed in said case; which said instructions are in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

LEWIS
vs.
ROBERTS.

Instructions Requested by Defendant.

First. The jury are instructed in this cause that on the whole testimony in this cause the defendant is entitled to recovery, and your verdict should be for the defendant.

Second. The jury are instructed that the statute of limitations in this cause is a complete bar as to the interest represented by the following heirs of Jacob Dawson, deceased, to wit: John Hampton Dawson, Mary Amanda Dawson, William Ross Dawson, and Albert Lincoln Dawson.

Refused. Special findings to be returned by jury.

(S'g'd) ELMER S. DUNDY, *Judge.*

Upon the back of said instructions appear endorsements in words and figures following, to wit:

No. 23, doc. M. Walter F. Lewis *vs.* A. Roberts. Instructions asked by defendant. Filed Jan'y 21, 1888. Elmer D. Frank, clerk.

5 Thereupon, afterwards, to wit, at the Jan'y term of said court, on the 21st day of Jan'y, 1888, the following proceedings were had in said case, as appears of record on folio 637, Journal M of said court:

WALTER F. LEWIS
vs.
ARTEMAS ROBERTS. } 23, M. Trial.

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit: 1, Chas. C. Reed; 2, A. G. Hastings; 3, Sol. Meyers; 4, Geo. Karcher; 5, C. H. Buford; 6, S. B. Pratt; 7, Geo. H. Dolsen; 8, Andrew Moffit; 9, James L. McCord; 10, J. R. Bing; 11, J. M. Brown, and the parties hereto agreeing to try this cause to the said eleven jurors that were duly empaneled and sworn according to law; and thereupon, after hearing the evidence, argument, and charge of the court, the jury retire to their room in charge of a bailiff, duly sworn, for deliberation.

And now comes said jury into open court and present to the court their verdict, which is in words and figures following, to wit:

WALTER F. LEWIS
vs.
ARTEMAS ROBERTS. } Verdict.

We, the jury, being first duly sworn in this action to bring in our verdict according to the law and the evidence, do find, under the instructions of the court—

1st. That the title to the lots in dispute in this action was at the death of Jacob Dawson in fee in the said Jacob.

2nd. That on the 10 day of May, 1869, Jacob Dawson made his last will and testament, which was duly probated in the pro-
6 bate court of Lancaster county, Nebraska, and in which will it was, among other things, provided: To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to be and remain hers, with full power, rights, and authority to dispose of the same as to her shall seem meet and proper so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed or whatever may remain shall go to my surviving children, share and share alike.

3. That on the 15th day — Jan'y, 1870, said Editha J. Dawson made and executed a power of attorney to John H. Dawson, and on the 15th day of March, 1870, said Editha J., by said John H. Dawson, duly executed and delivered her warranty deed covering the premises in controversy to Perren England, and on the 15th day of December, 1871, said England and wife duly conveyed by warranty deed said premises to def't Roberts, who has ever since been in the peaceful occupation and possession of the same.

And under special direction of the said court we do further find that on the 14th day of December, 1879, the said Editha J. Dawson

intermarried with one Henry M. Pickering, and that on the 15th day of September, 1879, all of the surviving children of the said Jacob Dawson, to wit, William R. and Albert Dawson and their wives, and Evaline Dawson Kincely and husband, Milita Dawson, and Minnie S. Dawson, made, executed, and delivered to Highland H. Wheeler and Lionel C. Burr a warranty deed to said premises, and on the 27th day of April, 1880, the said Wheeler and said Burr and his wife made, executed, and delivered a warranty deed to Ezekiel Giles, and on the — day of May, 1887, said Giles and wife made, executed, and delivered a warranty deed to said premises in dispute to the plaintiff in this action.

7 And we do further find that at the decease of said Jacob Dawson he left real estate of the value of forty-eight thousand dollars, and of personal property of the value of $958 00 *dollars*; and we do further find the age of said children of Jacob Dawson as follows:

William R., born Sept. 12, 1853.
Albert L., born Jan'y 16, 1856.
Eviline M., born March 22, 1864, &
Minnie S., born November 9, 1866.

And we do further find, if the court be of opinion that under the said will that said Editha J. Dawson only took an estate determinable upon her marriage, that at the commencement of this action the plaintiff was seized in fee of said premises, to wit, lots 1, 2, 3, 4, 5, & 6, all in block 41, in Dawson's addition to South Lincoln, in Lancaster county, Nebraska, and entitled to the immediate possession thereof, and that plaintiff recover of and from the defendant ten cents damages; but if the court be of opinion that under and by virtue of said will the said Editha J. Dawson took an estate absolutely in fee, then we find for the defendant.

C. C. REED, *Foreman.*

Thereupon, afterwards, to wit, on the 23rd day of Jan'y, 1888, motions were filed in said case; which said motions are in words and figures following, to wit:

In U. S. C. C., District of Nebraska.

WALTER F. LEWIS
vs.
ARTEMAS ROBERTS.

Motion for Judgment on Special Verdict.

Comes now the said plaintiff and moves the court for judgment for plaintiff upon the special verdict filed herein and return by said jury.

J. M. WOOLWORTH,
L. C. BURR,
Att'ys for Plaintiff.

Upon the back of said motion appear endorsements in words
8 and figures following, to wit:

23, M. Walter F. Lewis *vs.* Artemus Roberts. Motion of plaintiff for judgment on the verdict. Filed Jan. 23, 1888. Elmer D. Frank, clerk.

In the Circuit Court for the District of Nebraska.

WALTER F. LEWIS, Plaintiff,
vs.
ARTEMUS ROBERTS, Defendant.

Motion for Judgment on the Verdict and Special Finding of the Jury.

Now comes the said defendant, by his attorneys, Harwood, Ames and Kelly, and moves the court for judgment for the defendant on the verdict and special findings of the jury in this cause.

HARWOOD, AMES & KELLY,
Attorneys for Defendant.

Upon the back of said motion appear endorsements in words and figures following, to wit:

No. 23, doc. M. Walter F. Lewis *vs.* Artemus Roberts. Motion for judgment on verdict. Filed Jan'y 23, 1888. Elmer D. Frank, clerk. Harwood, Ames and Kelly, att'ys for defendant.

Thereupon, afterwards, to wit, at the January term of said court, on the 2nd day of April, 1888, the following proceedings were had in said case, as appears of record on folio 737, Journal M of said court:

WALTER F. LEWIS
vs.
ARTEMAS ROBERTS. } 23, M. Judgment.

This cause having been heretofore submitted to the court on the motions of the plaintiff and defendant for judgment on the specia verdict herein, and the court, after being fully advised in the premises, doth now, on this day, order and adjudge that the
9 motion of defendant be overruled and the motion of plaintiff be sustained.

It is therefore further ordered and adjudged by the court that the plaintiff, Walter F. Lewis, is the owner of the land involved in this action, to wit:

Lots No. one (1), two (2), three (3), four (4), five (5), and six (6), all in block No. forty-one (41), in Dawson's addition to South Lincoln, in Lancaster county, Nebraska, and was at the commenc-ment of this suit.

And that said plaintiff was then and still is entitled to the possession of said premises, and that the defendant's claim of title to said lots was and is invalid, and said defendant was not at the commenc-ment of this action and is not now entitled to the possession of said lots.

It is further ordered by the court that said plaintiff have and recover of and from said defendant the possession of said premises and his costs herein expended, taxed at $—, and execution is awarded therefor.

Thereupon afterwards, to wit, on the 23rd day of May, 1888, a bond was filed in said case; which said bond is in words and figures following, to wit:

Know all men by these presents that we, Artemus Roberts, as principal, and W. W. Holmes, as surety, are held and firmly bound unto Walter F. Lewis in the full and just sum of one thousand dollars, to be paid to the said Walter F. Lewis, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a circuit court of the United States for
10 the district of Nebraska, in a suit depending in said court between Walter F. Lewis and Artemus Roberts, judgment was rendered against the said Artemus Roberts, in ejectment, for possession of property in controversy and costs of suit, and the said Artemus Roberts having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Walter F. Lewis, citing and admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such that if the said Artemus Roberts shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ARTEMUS ROBERTS.
W. W. HOLMES.

Approved by—
ELMER S. DUNDY, *Judge.*

Upon the back of said bond appear endorsements in words and figures following, to wit:

No. 23, M. United States circuit court, district of Nebraska. Walter F. Lewis, plaintiff, *vs.* Artemus Roberts, defendant. Bond. Filed May 23, 1888. E. D. Frank, clerk.

11 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you,

between Walter F. Lewis, plaintiff, and Artemus Roberts, defendant, a manifest error hath happened, to the great damage of the said defendant in the said cause, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the ~~first~~ Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done. Samuel F. Miller Asso. Justice

Witness the Honorable —— ——, ~~Chief~~ Justice of the said Supreme Court of the United States, at Omaha, in said district, this 23d day of May, 1888.

ELMER D. FRANK, *Clerk.*

Allowed by— (Seal)
ELMER S. DUNDY, *Judge.*

[Endorsed:] No. *No.* 23, M. United States circuit court, district of Nebraska. Artemus Roberts, pl't'f in error, *vs.* Walter F. Lewis, def't in error. Writ of error. Filed May 23, 1888. E. D. Frank, clerk.

12 THE UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

To Walter F. Lewis, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Artemus Roberts is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable —— ——, Chief Justice of the Supreme Court of the United States, at Omaha, this 23rd day of May, 1888.

ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 23, M. United States circuit court, district of Nebraska. Artemus Roberts, pl't'f in error, *vs.* Walter F. Lewis, def't in error. Citation. Filed May 23, 1888. E. D. Frank, clerk. Received a copy of this citation this 23 day of May, 1888, and our appearance is herein entered for defendant in error. J. M. Woolworth, — def't in error.

13 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

By virtue of the foregoing writ of error and in obedience thereto I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to 13, contain true and faithful transcripts of the pleadings and proceedings of record and on file in my office, as said clerk, in the case of Walter F. Lewis *vs.* Artemus Roberts, and that a copy of the writ of error and citation has been lodged and remains in my said office.

Witness my hand and the seal of said court, at Omaha, this 3rd day of October, A. D. 1888.

[Seal United States Circuit Court]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Case No. 13,418. Nebraska C. C. U. S. No. 285. Artemus Roberts, plaintiff in error, *vs.* Walter F. Lewis. Filed October 27, 1888.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

NO 285.

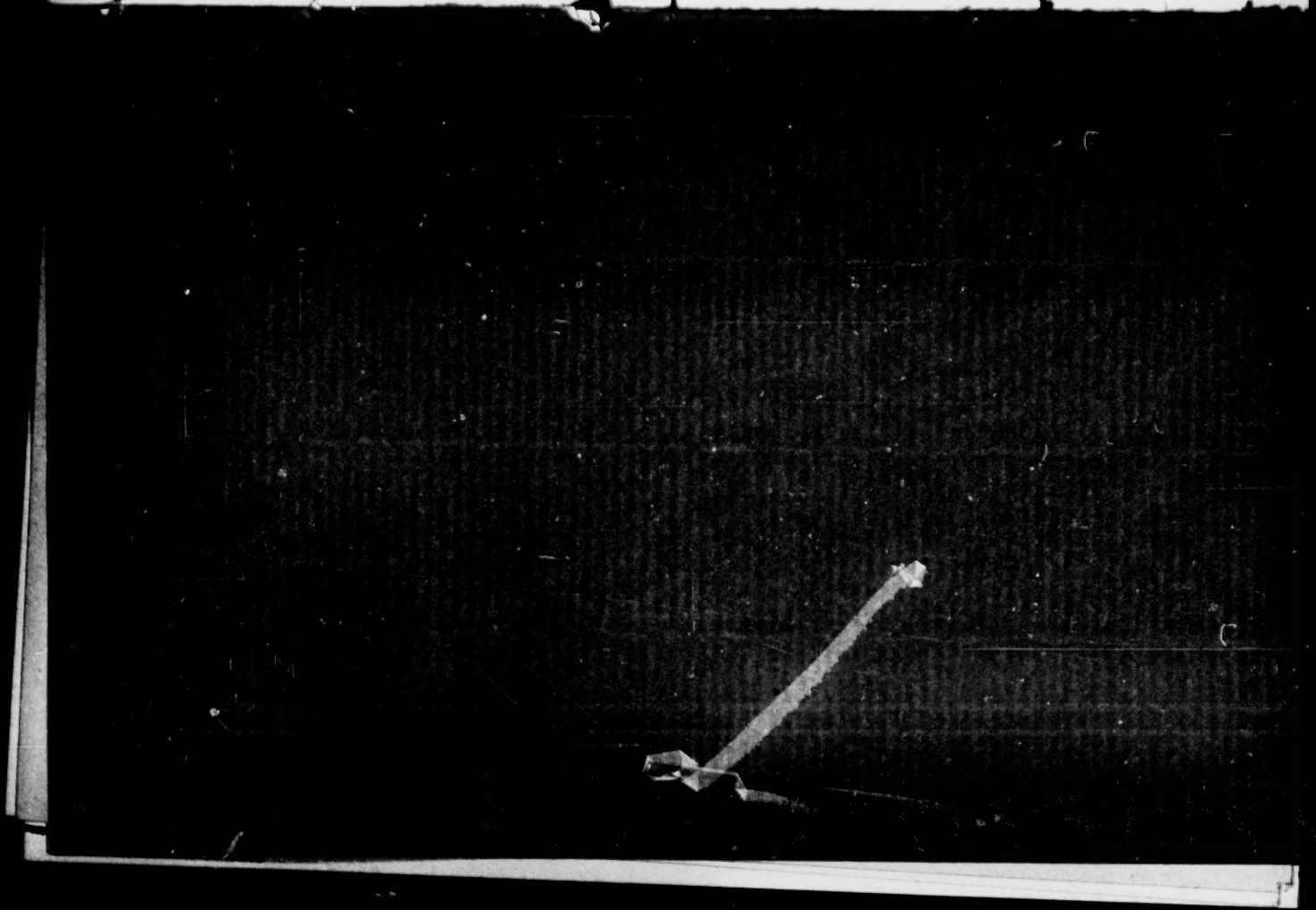
ARTEMAS ROBERTS,
Plaintiff in Error,

v.

WALTER F. LEWIS.

MOTION TO DISMISS OR AFFIRM.

J. M. WOOLWORTH,
L. C. BURR,
Attorneys for defendant in error.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

NO 285.

ARTEMAS ROBERTS,
Plaintiff in Error,

v.

WALTER F. LEWIS.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, by his attorneys J. M. Woolworth and L. C. Burr, and moves the Court to dismiss the writ of error sued out of this Court in the above entitled action, upon the following grounds:

1. The said writ of error is not sealed with the seal either of this Honorable Court, or the Circuit Court of the United States for the District of Nebraska, by the Clerk of which last named Court the same is signed.

2. The Honorable Morrison R. Waite, late Chief Justice of this Court, died on the 28th day of March, 1888; the Honorable Melville W. Fuller took his seat in this Court on the 8th of October, 1888; the Honorable Samuel F. Miller was, during the vacancy in said office, next in precedence. The said writ bears date the 23d of May, 1888. The said writ, should, as required by section 911 of the Revised Statutes, bear test of Mr. Justice Miller; instead whereof, the said writ is not tested in the name of any Judge of this Court.

'3. The said writ was by its terms, returnable on the first Monday in October, 1888; whereas, it should have been returnable on the first day of the October Term of that year, namely, the second Monday in that month.

For each and every the reason hereinbefore mentioned, the defendant in error prays this Honorable Court that the said writ of error be dismissed at the costs of the plaintiff in error.

In the event this Honorable Court should be of opinion that the errors and defects in the said writ of error above named, may be remedied by amendment thereof, this defendant in error, by his said attorneys, moves that the judgment sought to be brought here by the said writ be affirmed, for the reason that so far as appears from the record, no error inter-

vened in the proceedings whereon the said judgment was rendered.

J. M. WOOLWORTH,
L. C. BURR,
Attorneys for defendant in error.

To Mr. N. H. Harwood, of counsel for the plaintiff in error in the above entitled action:

Take notice that the motion, a copy of which is set forth above, will be submitted to the Supreme Court on the 25th day of January next, at the opening of court on that day, or as soon thereafter as the Court will receive the said submission.

J. M. WOOLWORTH,
L. C. BURR,
Attorneys for defendant in error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

NO 255.

ARTEMAS ROBERTS,

Plaintiff in Error,

v.

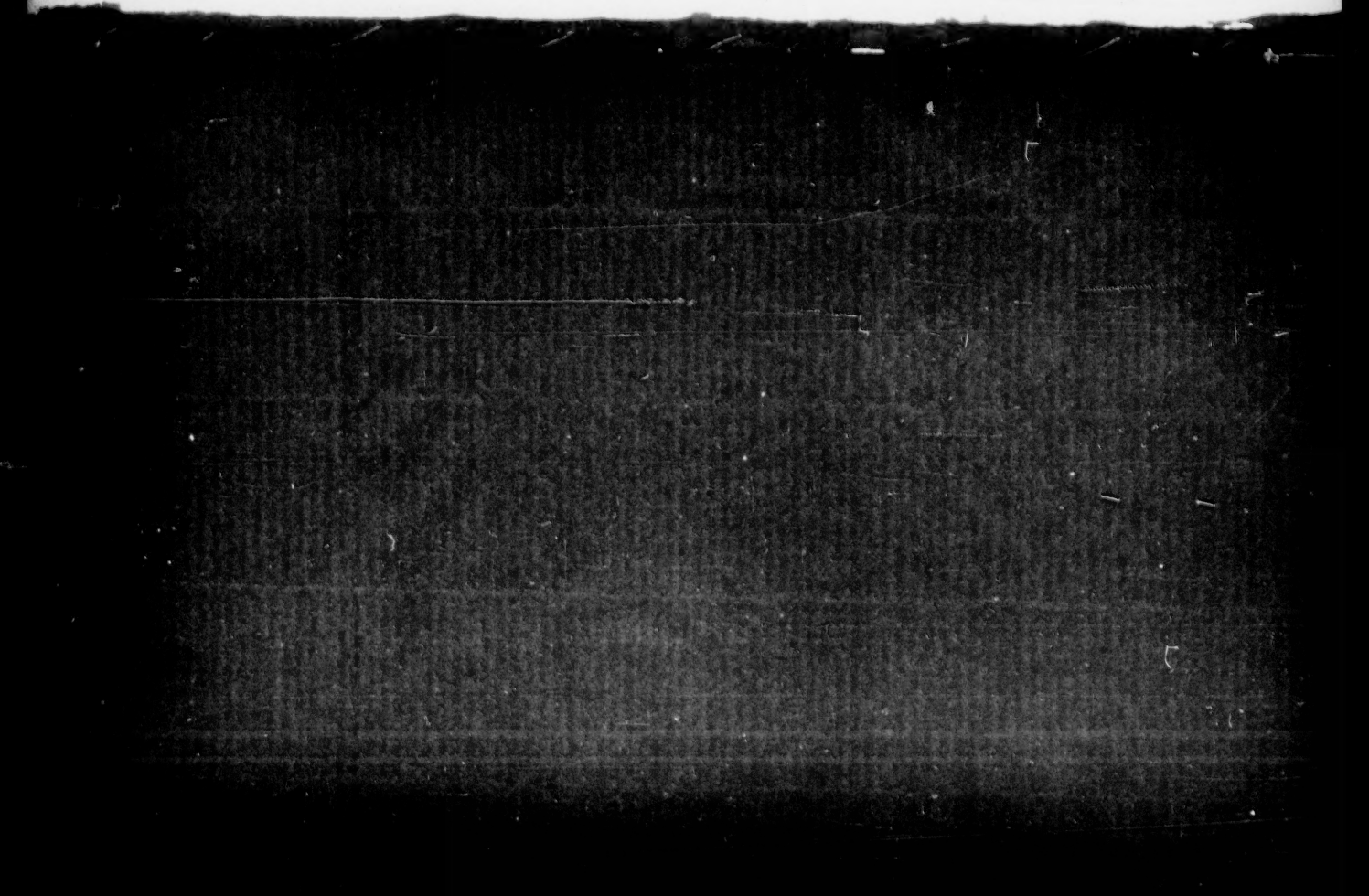
WALTER F. LEWIS.

BRIEF IN SUPPORT OF MOTION TO AFFIRM.

J. M. WOOLWORTH,

L. C. BURR,

Attorneys for defendant in error.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

No. 285.

ARTEMAS ROBERTS,
Plaintiff in Error,

v.

WALTER F. LEWIS.

BRIEF IN SUPPORT OF MOTION TO AFFIRM.

This was an action of ejectment to recover the possession of certain premises in Dawson's Addition to South Lincoln, in Lancaster County, Nebraska.

In pursuance of the statute of that State, the petition after stating the usual jurisdictional facts, alleges that the plaintiff has a legal estate in the premises described, and that the defendant has lawfully kept and still keeps the plaintiff out of possession.

The answer alleges the statute of limitations of the State, and denies each and every allegation in the petition. No bill of exceptions was saved on the trial, which was to a jury. Instructions were asked by the defendant, which are set forth on the third page of the printed record. But the refusal to give them was not excepted to, nor was the testimony upon which the same were asked, preserved; nor was the paper converted into a bill. By direction of the Court, the jury returned a special verdict, finding that Jacob Dawson at his death, was seized of the premises, and left his last will, whereby he devised all his estate to his wife, Editha J., "the same to be and remain hers with full power, rights and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow, upon the express condition however, that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain shall go to my surviving children, share and share alike;" that Mrs. Dawson, by her attorney in fact conveyed the premises to one England, who afterwards conveyed them to the plaintiff in error, Roberts, who has ever since been in the peaceable occupation and possession of the same; that eight years afterwards Mrs. Dawson married one Pickering. Three months before that event, the heirs at law of Jacob Dawson conveyed the premises in fee to Highland H. Wheeler and Lionel C. Burr, with warranty; and that they afterwards con-

veyed with warranty to Ezekiel Giles, who conveyed with warranty to the plaintiff. Thereupon, the jury found that if Mrs. Dawson took an estate determinable upon her marriage, the plaintiff, Roberts, was seized of the premises in fee, and was entitled to recover; on the other hand if the Court was of opinion that she took an estate in fee, then it should find for Lewis. Each party filed his written motion for judgment upon the verdict and special findings of the jury. Afterwards, the Court overruled the motion of the defendant, and sustained that of the plaintiff, and gave plaintiff judgment. No exception was taken or reserved by the plaintiff in error to the ruling of the Court upon the motion for judgment

FIRST POINT.

Upon this record there is nothing for this Court to examine. It was the duty of the plaintiff in error, if he desired to review the decision of the Circuit Court, to incorporate his motion in a bill of exceptions, setting forth the ruling of the Court thereon and his exceptions thereto. That no ruling of the Court can be reviewed unless the same be duly excepted to and a record thereof preserved, has been decided here so many times that it is useless to cite the cases. The necessity of this action in respect of motions, was stated by this Court in *Knapp v. the Railroad Co.*, 20 Wall., 117. Mr. Justice Davis, on page 121, said, "If either party in an action at law is desirous

of preserving the evidence either at the trial or on a preliminary motion, in order to raise a question of law upon it, he must ask to have it incorporated in a bill of exceptions. This is the only way in which it can be done, unless the parties choose to make an agreed statement of facts Neither mode was adopted in this case, and we are, therefore, without the means of knowing what evidence was introduced on either side on the motion to remand. The question of jurisdiction is, therefore, to be decided on the papers properly in the record."

In *Young v. Martin*, 8 Wall., 354, Mr. Justice Field, speaking for the Court said, "the exception to the ruling in denying the motion for judgment on the pleadings, is not only subject to the general objection already stated (namely, that the ruling upon the motion and the exception thereto should be preserved by bill), but to the further objection that the grounds upon which the motion was made or denied, are not given."

It is not possible for this Court to say that the judgment in this case was erroneous, without having before it the evidence upon which the verdict was found. Many facts may have been proved throwing light upon the proper construction of the will, which influenced the trial judge in reaching his conclusion.

SECOND POINT.

In the ruling upon the motions for judgment, the learned

Judge construed the will as this Court had done in *Giles v. Little*, 104 U. S., 291. Those members of this Court who were here when that case was before them will remember the interesting circumstances leading to the result. All of the judges were at last agreed that the proper construction of the will was as stated in the report. That determination will not be reconsidered here.

This Court should not change its construction of the will on account of the contrary opinion of the Supreme Court of the State in *Little v. Giles*, 25 Nebr., 315.

Lane v. Vick, 3 *How.*, 464, 476.

J. M. WOOLWORTH,

L. C. BURR,

Attorneys for defendant in error.

FILED
JAN 18 1892
JAMES H. MCKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 285.

ARTEMAS ROBERTS, PLAINTIFF IN ERROR,

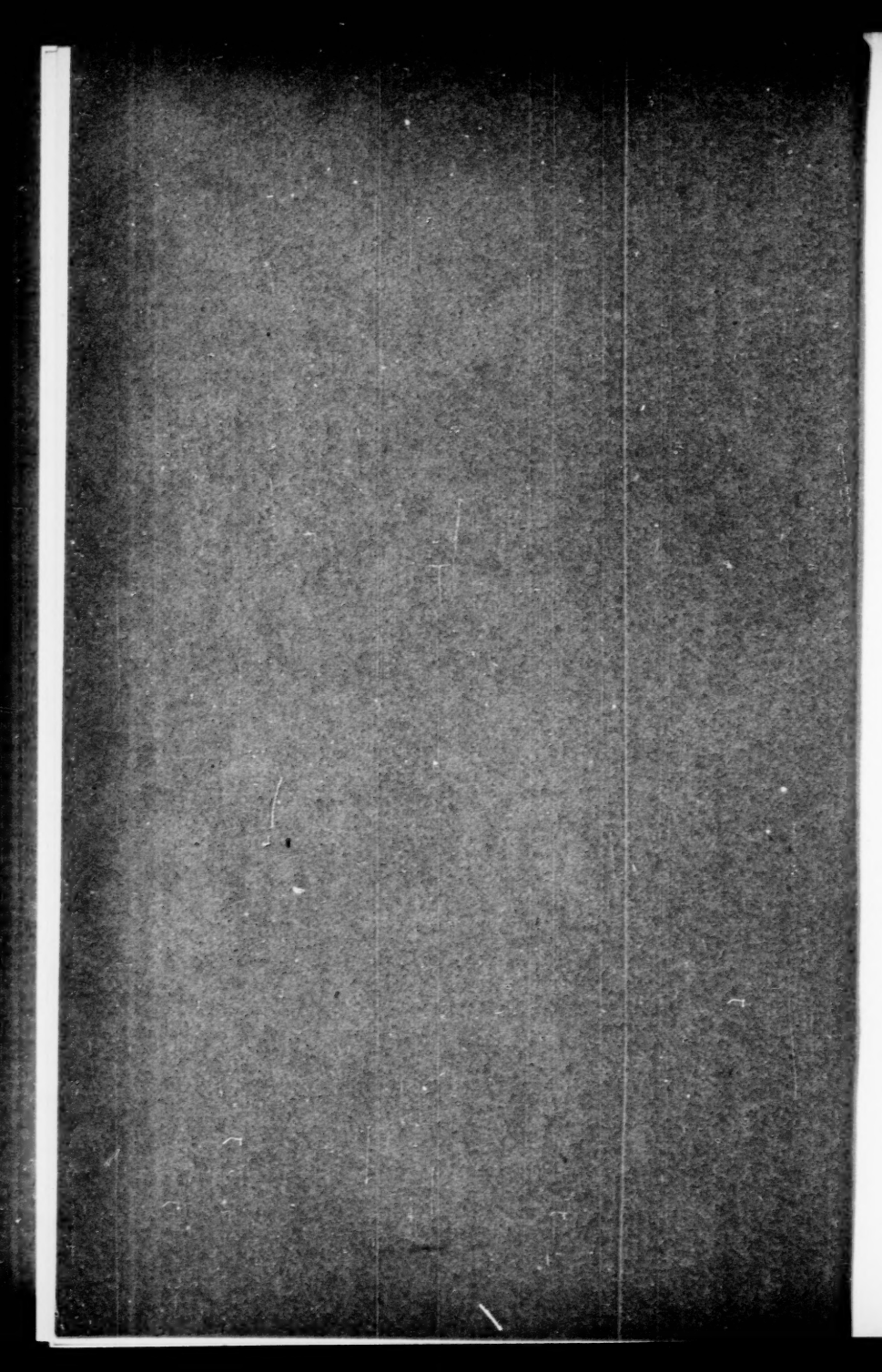
vs.

WALTER F. LEWIS, DEFENDANT IN ERROR.

Brief for plaintiff in error in opposition to motion to dismiss or affirm.

N. S. HARWOOD,
JOHN H. AMES,
Attorneys for the Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



In the Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 285.

ARTEMAS ROBERTS, PLAINTIFF IN ERROR,

vs.

WALTER F. LEWIS, DEFENDANT IN ERROR.

Brief for plaintiff in error in opposition to motion to dismiss or affirm.

It is admitted that the writ of error in this case does not bear the test of Samuel F. Miller, senior associate justice at the date of said writ, nor of any judge of this Court; nor was it sealed with the seal of the circuit court nor of this Court. These formalities were omitted by the clerk of the circuit court, and were not observed by counsel until the record was printed, and they were called to their attention by service of notice of this motion. It also appears that the writ of error was made returnable the *first* instead of the *second* Monday in October.

These, however, are informalities which under the present statute are not fatal, and, in the opinion of counsel for plaintiff in error, are waived by subsequent proceedings which will be hereinafter referred to. The purpose of the writ of error is to bring the record to this Court. It is the *process* of this Court to the lower court, commanding it to

bring the record here by the first day of the next term, under its seal, for review. The citation is notice to the opposite party that the process of this Court has been issued, and admonishes him to appear on the first day of the next term and show cause, if any he has, why the error complained of should not be corrected.

Now, the record of this case as tried in the lower court is here, under the hand and seal of the clerk of that court; but the process, the instrument by which that record is brought here, is defective. After the writ was taken out the defendant in error, by his counsel, made the following entry on the back of the citation:

"Received a copy of this citation this 23rd day of May, 1888, and our appearance is herein entered for defendant in error.

"J. M. WOOLWORTH,
"*Defendant in Error.*"

See endorsement on back of citation, bottom page 8, printed record.

THE LAW.

This is a general, unqualified appearance, and cures the defect in the writ. Where a court has jurisdiction of the subject-matter of an action a voluntary appearance waives all defects in process or in the service thereof and confers jurisdiction over the parties.

Gracie *vs.* Palmer, 8 Wheat., 699.
Cropsey *vs.* Wigginhorn, 3 Nebr., 108.
Creighton *vs.* Kerr, 20 Wall., 8.
Sage *vs.* R. R. Company, 96 U. S., 715.
Hawes on Jurisdiction of Courts, section 240.

This Court, in The State of Rhode Island *vs.* The Commonwealth of Massachusetts, 12 Peters, 657, held that "an objection to the jurisdiction on the ground of exemption

from the process of the court in which suit is brought or the manner in which the defendant is brought into it is waived by appearance."

And in Gracie *vs.* Palmer, *supra*, that "where defendant voluntarily appears without taking exceptions it was an admission of the service and a waiver of any further inquiry into the matter."

In Woods *vs.* Lide, 4 Cranch, 180, this Court held:

"In the present cause, the writ of error having been served when in full force and the writ of error returned, although not at the next term, the appearance of the defendant in error has waived all objection to the irregularity of the return."

This was as though there had never been any writ, for this Court has held, times without number, that after the expiration of the return term, without a return having been made, the appeal or writ of error expires, ceases to exist, and a new appeal or writ is indispensable to the jurisdiction of this Court; and this Court again held in Radford *vs.* Folsom, 123 U. S., 725, that the appearance of the defendant in error or appellee at the return term deprives the party appearing of the right to have the case dismissed at a succeeding term, because the return was not made in time.

In Aldrich *vs.* Ætna Company, 8 Wall., 496, the Court remarked:

"It is objected also that the citation was not signed by the judge who allowed the writ of error. The answer to that is that the appearance by the defendant in error waived the irregularity."

In Creighton *vs.* Kerr, 20 Wall., 12, the Court uses the following language:

"A general appearance waives all question of the service of process. The question of jurisdiction only is saved."

The jurisdiction here referred to is over the subject-matter,

and not the person. Here the subject-matter is before the Court, properly sealed and certified, and the person is here by appearance.

From the foregoing authorities, and many others which might be cited, it would appear that when the record is once here, under the seal of the lower court, and a general appearance has been entered therein by the defendant in error, that the purpose and object of the writ have been accomplished, and it is too late to move to dismiss for irregularities in the proceedings by which the record and the party are brought into this Court; that the defect in the writ is immaterial.

If, however, the Court should be of opinion that a general appearance does not waive these defects in the writ of error, then the counsel for the plaintiff in error asks leave to withdraw the writ of error and correct the same by having the clerk affix his seal thereto, and insert the teste of Samuel F. Miller, senior associate justice, or Melville W. Fuller, Chief Justice, as to the Court shall seem proper, and insert second Monday in October instead of first Monday, as now written, and herewith offer the following motion and affidavit in that behalf:

IN THE SUPREME COURT OF THE UNITED STATES.

ARTEMAS ROBERTS, *Plaintiff in Error*,

vs.

WALTER F. LEWIS, *Defendant in Error*.

Motion to Correct Writ of Error.

Comes now the said plaintiff in error, by his counsel, Nathan S. Harwood and John H. Ames, and moves the Court for leave to withdraw writ of error and make the following amendments and corrections thereto:

1. Affix thereto the seal of the circuit court for the district of Nebraska.

2. Insert the teste of Samuel F. Miller, senior associate justice of this Court at the date of said writ, or of the present Chief Justice of this Court, as to the Court may seem proper.

3. Insert in the return day of said writ second Monday in October in place of first Monday in October.

This motion is supported by the affidavit of Nathan S. Harwood, herewith submitted.

NATHAN S. HARWOOD and
JOHN H. AMES,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

ARTEMAS ROBERTS, *Plaintiff in Error,*

vs.

WALTER F. LEWIS, *Defendant in Error.*

Affidavit.

STATE OF NEBRASKA, } ss:
Lancaster County, }

Nathan S. Harwood, being first duly sworn, says that he is and was on the 23rd day of May, 1888, an attorney and counsellor of this Court and of the circuit court of the United States for the district of Nebraska; that on said 23rd day of May, 1888, this affiant served on Honorable J. M. Woolworth, the attorney for the defendant in error, who was also the attorney for him in the circuit court, a copy of the citation in the record herein. At the time of receiving said citation the said Woolworth took his pen and wrote on the back of the citation these words:

"Received a copy of this citation this 23rd day of May, 1888, and our appearance is herein entered for defendant in error," signed his name "J. M. Woolworth, for defendant in

error;" which endorsement appears in the printed record in this cause at page 8 thereof.

Affiant further says that he accepted said appearance and relied upon it, believing it to be sufficient to bring the defendant in error into this Court, whether a writ of error or citation were issued or not.

NATHAN S. HARWOOD.

Subscribed and sworn to before me this 15th day of January, 1892.

[SEAL.] ELMER E. SPENCER,
Notary Public.

Counsel for plaintiff in error are aware that this Court held in Wells *vs.* McGreggor, 13th Wall., 189, that the omission of the teste of the Chief Justice was fatal and could not be amended; but this decision and others of like character, which deprived the plaintiff in error of his right of review, through no fault of his own but by the oversight or mistake of the clerk, must have struck the profession and Congress as unnecessarily harsh, inasmuch as the printing of the name of the Chief Justice was in no proper sense a teste, for there was introduced almost immediately thereafter and passed through Congress the section now known as 1005 of the Revised Statutes, with the following significant title: "AN ACT TO FURTHER THE ADMINISTRATION OF JUSTICE." This section is as follows:

"That the Supreme Court may at any time, in its discretion and upon such terms as it may deem just, and where the defect has not injured and the amendment will not prejudice the defendant in error, allow an amendment of a writ of error when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ."

Under the provision of this section the plaintiff in error rests his claim for authority to amend in the event that the

appearance should be held not to be a waiver of the defects in the writ.

The case of Idaho and Oregon Land Company *vs.* Bradbury, 132 U. S., 513, seems to be in point and to fit this case. The language of the opinion bearing on this question is as follows:

"The question presented is not one of no authentication, but of irregular or imperfect authentication; not of jurisdiction, but of practice. It is therefore within the discretion of this Court to allow the defect to be supplied. Considering that the motion to dismiss was not made until it was too late to take a new appeal or writ of error, justice requires that the record should be permitted to be withdrawn for the purpose of having the certificate of authentication perfected by adding the signature of the clerk."

With this quotation we submit this part of the motion, believing that we have given sufficient reasons why this writ should not be dismissed. We think the irregularities here are much less serious and, under the practice of this Court, much more easily remediable or overlooked than were those of the appeal in Hilton *vs.* Jones, No. 161, a motion to dismiss which was denied at the present term.

The errors, though more numerous, are of the same character as in Metcalf *vs.* Watertown, No. 412 of this term, in which a motion to amend the writ by affixing the seal of the court was granted. This is in accordance with many decisions of this Court rendered since the above-mentioned enactment, that a writ which is even colorable may be amended.

II.

There is no ground for the affirmance of the judgment below, and at this stage of the proceeding this case stands on the docket of this term number 285, and will certainly be reached for argument at this term. The effect of this

motion is simply to advance the case for immediate hearing. There are only two questions in the record. These are important and vital questions:

First. The statute of limitations, which is clearly presented in the record; and

Second. Whether this Court will adhere to its own interpretation of the will, in Giles *vs.* Little, 104 U. S., 291, or will follow that of the supreme court of Nebraska, in Little *vs.* Giles, 25th Nebraska, 313.

In support of the foregoing propositions we submit the accompanying brief, which we had, previous to receiving notice of this motion, prepared for use in an argument on the merits.

N. S. HARWOOD,
JOHN H. AMES,
Attorneys for the Plaintiff in Error.

JAN 15
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

No. 285.

ARTEMAS ROBERTS, PLAINTIFF IN ERROR,

vs.

WALTER F. LEWIS, DEFENDANT IN ERROR.

Brief for Plaintiff in Error.

By N. S. HARWOOD and JOHN H. AMES, Attorneys.

CALHOUN & WOODRUFF, PRINTERS, LINCOLN, NEB.

IN THE

Supreme Court of the United States

No. 285.

ARTEMAS ROBERTS, PLAINTIFF IN ERROR,

vs.

WALTER F. LEWIS, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

By N. S. HARWOOD and JOHN H. AMES, Attorneys.

STATEMENT OF THE CASE.

This was an action in ejectment, or "An Action for the Recovery of Real Property," as it is named by the Code of Civil Procedure of the State of Nebraska, brought by the defendant in error in the United States Circuit Court for the District of Nebraska, for the purpose of trying the title to certain building lots which are situated in the City of Lincoln, in said State, and to which the plaintiff in error was, and for more than fif-

teen years prior to the beginning of the action had been in the possession and claiming to be the owner. The petition after the jurisdictional averments, states the alleged cause of action in the following words: (Record, Page 1.)

"2. The plaintiff further complains of the defendant for that plaintiff has a legal estate in, and is entitled to immediate possession of the following described property, to-wit: Lots 1, 2, 3, 4, 5, and 6, all in block number 41, in Dawson's Addition to South Lincoln, in Lancaster County, Nebraska; and that said defendant has ever since the 11th day of April, 1887, unlawfully kept, and still keeps the plaintiff out of the possession thereof."

The answer is in the following words: (Record, Page 2.)

I.

"The above named defendant for amended answer to the plaintiff's petition says that he is, and for more than ten years prior to the commencement of this action he had been, and still is in open and adverse possession of the premises in controversy."

II.

"Defendant further answering denies each and every allegation in said petition contained."

At the conclusion of the trial the jury returned the following special verdict only: (Record, Page 4.)

"WALTER F. LEWIS,
vs.
ARTEMAS ROBERTS.

VERDICT.

"We, a jury being first duly sworn in this action to bring a verdict according to the law and the evidence, do find under the instructions of the Court:

"1st. That the title to the lots in dispute in this action was at the death of Jacob Dawson, in fee in the said Jacob.

"2d. That on the tenth day of May, 1869, Jacob Dawson made his last will and testament, which was duly probated in the Probate Court of Lancaster County, Nebraska, and in which will it was among other things, provided: 'To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to be and remain hers with full power, right and authority to dispose of the same as to her shall seem meet and proper so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, shall go to my surviving children, share and share alike.'

"3d. That on the 13th day of January, 1870, said Editha J. Dawson made and executed a power of attorney to John H. Dawson, and on the 15th day of March, 1870, said Editha J., by said John H. Dawson, duly executed and delivered her warranty deed conveying the premises in controversy to Paren England, and on the 15th day of December, 1871, said England and wife duly conveyed by warranty deed said premises to Defendant Roberts, who has ever since been in the peaceful occupation and possession of the same.

"And under special direction of the said court, we do further find that on the 14th day of December, 1879, the said Editha J. Dawson intermarried with one Henry M. Pickering, and that on the 15th day of September, 1879, all of the surviving children of the said Jacob Dawson, to-wit: William R. and Albert Dawson and their wives, and Evaline Dawson Knicely and husband, Melita Dawson and Minnie S. Dawson, made, executed and delivered to Highland Wheeler and Lionel C. Burr a warranty deed to said premises, and on the 27th day of April, 1880, the said Wheeler and the said Burr with his wife, made, executed and delivered a warranty deed to Ezekiel Giles, and on the . . . . . day of May, 1887, said Giles and wife made, executed and delivered a warranty deed of said premises in dispute to plaintiff in this action.

"And we do further find that at the decease of said Jacob Dawson, he left real estate of the value of forty-eight thousand dollars, and of personal property of the value of $958.

"And we do further find the ages of said children of Jacob Dawson as follows: William R., born September 12th, 1853; Albert L., born January 16th, 1856; Evaline M., born March 22d, 1864, and Minnie S., born November 9th, 1866.

"And we do further find if the Court be of opinion that under the said will the said Editha J. Dawson only took an estate determinable upon her marriage, that at the commencement of this action the plaintiff was seized in fee of said premises, to-wit: Lots 1, 2, 3, 4, 5 and 6, all in block 41, in Dawson's Addition to South Lincoln, Lancaster County, Nebraska, and entitled to the immediate possession thereof, and that plaintiff recover of and from defendant ten cents damage. But if the Court be

of opinion that under and by virtue of said will the said Editha J. Dawson took an estate absolute in fee, then we find for the defendant.

"C. C. REED, Foreman."

Each party moved the Court for judgment in his favor upon said verdict, and the Court entered the following judgment: (Record, Page 6.)

"WALTER F. LEWIS,
vs.
ARTEMAS ROBERTS.

JUDGMENT.

"This cause having been heretofore submitted to the Court on the motions of the plaintiff and defendant for judgment on the special verdict herein, and the Court, after being fully advised in the premises, doth now on this day, order and adjudge that the motion of defendant be overruled, and that the motion of plaintiff be sustained.

"It is further ordered and adjudged by the Court that the plaintiff, Walter F. Lewis, is the owner of the land involved in this action, to-wit: Lots number one (1), two (2), three (3), four (4), five (5) and six (6), all in block number forty-one (41), in Dawson's Addition to South Lincoln, in Lancaster County, Nebraska, and was at the commencement of this suit; and that said plaintiff was, and still is entitled to the possession of said premises, and that the defendant's claim of title to said lots was and is invalid, and said defendant was not at the commencement of this action, and is not now entitled to the possession of said lots.

"It is further ordered by the Court that said plaintiff have and recover of and from said defendant the possession of said premises and his costs herein expended, taxed at $ . . . . . , and execution is awarded therefor."

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns as errors apparent upon the record in said cause:

1st. That the will, a copy of a portion of which is set out in the above recited verdict, together with the deeds of conveyance thereto, found to have been executed and delivered, vested the title in fee to the property in controversy in the defendant in said action, and that therefore the Court should have entered judgment dismissing said action and in favor of the defendant for costs.

2d. That in event the foregoing assignment of error is not well laid, yet that the verdict shows that the defendant had acquired title to an undivided part of the lands in controversy by adverse possession, and the action being for the recovery of the whole thereof upon a joint demise, could not, therefore, be maintained, and should have been dismissed at the costs of the plaintiff.

3d. The citizenship of the parties is denied by the answer, and not found by the verdict.

POINTS AND AUTHORITIES.

The will, a part of which is recited in the verdict, is the same instrument which received a construc-

tion adverse to the contention of the plaintiff in error by this court in the case of Giles vs. Little, 104 U. S., 291, and subsequently a contrary construction by the Supreme Court of the State of Nebraska in Little vs. Giles, 25th Nebraska, 313. In the syllabus of the opinion of the latter court, which is prepared by the Judges and has the same force as, and is in reality a part of, the opinion itself, the following language is used:

"A devise, 'To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal of which I may die seized, the same to remain hers with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she shall marry again, then it is my will that all of my estate herein bequeathed, or whatever may remain, shall go to my surviving children share and share alike,' etc., *held* that under the statutes of this state a conveyance of such real estate by Editha J. Dawson after the death of the testator and before her remarriage, conveyed the fee to such realty, and her subsequent marriage did not affect the title to the same." "The words 'whatever may remain' in the will, apply to both the real and personal estate, and are restricted to such parts of the estate as remained undisposed of at the time of the second marriage of Mrs. Dawson." And in the body of the opinion, the court say:

"The construction of the will in question by the United States Supreme Court, under the common law, had that controlled the case, therefore, no doubt was correct.

"The common law rule, however, has been changed

in this state in two important particulars: First, 'The term 'heirs,' or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple. Comp. Stat., Chap. 23, Sec. 49. And second: Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it should clearly apear by the will that the devisor intended to convey a less estate. Comp. Stat.. Chap. 23, Sec. 124.

"The first of these sections is not referred to in the opinion of the United States Supreme Court, and probably the court's attention was not called to it; and the latter section was by mistake, no doubt, copied incorrectly, the word 'clearly' being omitted. Giles vs. Little, 104 U. S., 299.

"Mr. Justice Wood, therefore, in writing the opinion, gave no weight to the section whatever. The section of the statute in question was copied from the statute of Michigan, and its proper construction was before that court in Wier vs. Mich. Stove Co., 44 Mich., 506, 7 N. W. R., 78; Chandler vs. Shaw, 52 id., 18, 17 N. W. R., 223.

"In Wier vs. Mich. Stove Co. it is said, 'The language of the testator in the bequest to his wife is clear and unqualified, and unless restricted by what follows, should not be open to question. Does it clearly appear by what follows thereafter that the devisor intended to convey less than his entire estate to his wife? If there are doubts, then, under the statute, they must give way to the otherwise clearly expressed intention.

"In Dew vs. Kuehn, 64 Wis., 300, 25 N. W. R., 212, the supreme court of Wisconsin, under a statute substantially the same as our own, held that the statute 'changed

the rule as to the presumption of the estate devised,' and such we understand to be the effect.

"In Robbins Exr. vs. Robbins, 9 S. W. R., 254, where the testator in his will had directed certain real estate sold as soon as the executor thought best for the estate, or his widow, the proceeds to be invested in bonds for her use, she was prohibited from loaning the proceeds, but permitted to use the interest as well as the rents. There were other devises of property to the wife, 'to do with as she might think fit.' The court held that she took an absolute fee in the land, in view of the Kentucky statutes that estates shall be deemed in fee simple unless a contrary intention appears."

This latter cause was begun in the state courts on the 27th day of January, 1882, removed thence to the circuit court of the United States for the District of Nebraska, where a decree was entered in accordance with the construction put upon the will in Giles vs. Little, 104 U. S., 291; and an appeal from that decree was taken to this court, by whom it was reversed November first, 1886, opinion, 118 U. S., 596, and the cause remanded to the state court for trial. The tracts of land involved herein were described by the pleadings, and the title thereto was intended to be litigated by the plaintiffs in the case last above mentioned, but by mistake the title thereto was alleged to be in a mortgagee, a relative of the plaintiff in error herein, instead of in himself. After that cause had been reversed and remanded by this court to the state courts, as above stated, and in May, 1887, Giles executed a deed to the defendant in error herein, and began this action on the 20th day of June, following.

The first question presented then, is: Will this court adhere to its own interpretation of the will in Giles vs. Little, 104 U. S., 291, or will it follow that of the supreme court of Nebraska in Little vs. Giles, 25th Nebraska, 313? We think it will do the latter. It would suffice for this purpose if the rule of property in Nebraska in this respect had first been settled by the opinion in the last mentioned case; but it is more exact to say that it was settled by the enactment of the statute mentioned, which at the time of its enactment had already received a construction by the courts of the state from which it was adopted; which construction by a familiar rule of law, is regarded as having been incorporated into, and as having become a part of the statute itself, and as having equally with the text, influenced the mind of the legislature in adopting it. We think, however, that the opinion of this court in Suydam vs. Williams, 24 Howard U. S., 427, which has never been departed from or shaken, and which case is in all essential particulars identical with the one now before the court, is conclusive of the question here under discussion. That case was an action in ejectment in the circuit court for certain lots of land in the City of New York by the defendants in error against the plaintiffs in error. The plaintiff in the circuit court claimed under a devise in the will of Mary Clarke, who died in the year 1802, by which she gave a trustee therein named, that part of the farm upon which she resided, and which she called Chelsea, in trust, to receive the rents and profits thereof, and to pay the same to Thomas B. Clarke; and further in trust to convey the same to the

lawful issue of said Thomas B. Clarke, living at his death, in fee. The property in dispute was a portion of the estate of Thomas B. Clarke, who died in 1826, and the plaintiffs had the title to this property of his three children, who were living at his death. The will simply gave to Thomas B. Clarke and to his executors the rights to receive the rents, issues and profits thereof to his use, and they were to convey to his heirs in fee. The question arose what effect had certain acts of the legislature of the State of New York upon the construction of said will? Prior to this time the Supreme Court of the United States had construed the will under the enactments in such a way as to hold that the act of the legislature divested the fee out of the trustee who had previously held it, but did not vest in such person power to act in his place, and that the grantee of the purchaser from the latter did not obtain a valid title. Afterwards the state court put such a construction upon the same will and statutes as to hold that such purchaser from the trustee did acquire valid title in fee simple. A dispute thereupon arose between the partisans of the two courts, similar in its character to that now presented; and, so far as determining which of the diametrically opposite judicial opinions shall be taken and adhered to as the law governing the case, the opinion in Suydam vs. Williams, *supra*, is in point, and as it seems to us, decisive; and in the opinion this court say:

"The judgment in Clarke vs. Van Surley is a determination of the court of last resort in that state, not only

upon all the questions of law in the case under consideration, but upon the identical title under which the plaintiff in the reported case, and the defendant in the present case, claim to own the premises in controversy in the respective suits. * * * In such a case, there being no pretense of collusion, and no reason to impute carelessness or inattention to the judges, the determination should be considered final and conclusive upon all persons in interest, or who may become interested in the question, as well as upon the parties to the particular action. * * * And the question is now presented to this court, whether they shall adhere to their own opinion as expressed in the case in 8th Howard, or acknowledge the authority of the courts of New York to settle finally the contest upon this title."

"The subject of the dispute is real property situate within the State of New York, and her laws exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. * * * Every sovereign has the exclusive right to command within his territory; and the laws which originate rights to real property are commands addressed to the members of the State, requiring them to abstain from any interference with the proprietary right they recognize or establish; and in respect to this subject the sovereignty of New York has not been impaired by her adoption of the Federal Constitution. * * * The title of the devisees of Mary Clarke was divested by authority conferred by the Legislature of the State, which was exercised subject to the oversight of her own tribunals. The persons affected by this authority were natives of the state, children under the superintending care of the parental jurisdiction of the state. It was in the constitutional exercise of this supreme and exclusive

jurisdiction that this title was disturbed. It behooves every other state to enforce or maintain rights which have thus originated in laws operating within their legitimate sphere, and which defeat no policy of their own; and the jurisdiction of this court attests the care with which this court has observed the general obligation, (of which this is a particular instance), in its administration throughout the Union."

"The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law establishing a rule of real property has been settled in the State courts, the same rule would be applied by this court that would be applied by the state tribunals."

And in Henderson vs. Griffin, 5th Peters, 151, the Court say:

"A deliberate decision by the highest Court of a State of the question whether the statute of uses is part of the common law of a State, and as to the operation of the articles in a will of lands under that law, is received by this Court as a rule of property there."

Many other decisions of this Court to the same effect might be quoted, were it supposed to be necessary; but the whole question underwent a thorough re-examination by the late Mr. Justice Miller, speaking for this Court in Bucher vs. Cheshire R. R. Co., 125th U. S., 555, and the principles of the foregoing, among other similar decisions therein recited, were expressly reaffirmed. It is sufficiently evident that the Courts of either the State or of the United States, must be permitted once for all to

settle the question of this title. It would be intolerable that of two persons claiming under the same right, one should succeed because his antagonist was a citizen of the State of Nebraska, and another should fail because his antagonist was a citizen of another State, or that one should succeed because the value of the lands in controversy was less than two thousand dollars, while another should fail because the value of his lands exceeded that sum.

II.

The Nebraska statute with respect to actions like the one at bar, enacts that: "In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal estate therein, and is entitled to possession thereof, describing the same as required by Sec. 133; and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived." The Code of Civil Procedure, Sec. 626.

Sec. 133 of the Code thus referred to, enacts:

"In an action for the recovery of real property, it shall be described with sufficient certainty to enable an officer holding an execution, to identify it."

Sec. 6 of the Code enacts: "An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within ten years after the cause of action shall have accrued."

Sec. 16 enacts: "If a person entitled to bring any action mentioned in this title except for a penalty or forfeiture, be at the time the cause of action accrued, within the age of twenty-one years, * * * every such person shall be entitled to bring such action within the respective times limited in this title after such disability shall be removed."

It is found by the verdict that the conveyance from Mrs. Dawson under which the plaintiff in error claims, was made in March, 1870, and the adverse possession began at that time. Of the five children of Jacob Dawson who joined in the deed to Giles, through which defendant in error derives title, two, William R. and Albert M., are shown by the verdict to have been more than thirty-one years of age at the beginning of this action. The age of the third child, Melita, is not shown, but the presumption is that people are *sui juris* and she should be presumed to have been also more than thirty-one years of age at the beginning of the suit.

If the construction of the will contended for by the defendant in error should prevail, the children of Jacob Dawson at the marriage of the widow in December, 1879, became entitled either as joint tenants or as tenants in common, and if Mrs. Dawson acquired by the will only a tenancy for life, subject to be determined by marriage, then by attempting to convey the fee and putting her grantee into possession, she forfeited her estate, and the remainder men become entitled to re-enter at once.

French vs. Rollins, 21 Maine, 372.

Patrick vs. Sherwood, 4 Blatchford, 112.
Grant vs. Chase, 17 Mass., 443.
Stump vs Findlay, 2 Rawle, Pa., 168.

Doubtless it will not be disputed that the foregoing is a true statement of the common law, and in Nebraska there is no statute relative to the matter except the following: Section I, chapter 15, Compiled Statutes:

"So much of the common law of England as is applicable and not in consistent with the constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law within said state."

As to an undivided two-thirds of the land in dispute, the answer of the Statute of Limitations was a complete defense, and this court has held in consonance with judicial authority elsewhere, that where one of two or more joint tenants is barred by the statutes, all are barred.

Marsteller vs. McClean, 7th Cranch, S. C., 156.
Affirming same case, 1st Cranch, C. C., 576.

See also to same effect:

Dickey vs. Armstrong, 1st A. K. Marshall, Ky., 29.
Oxnard vs. Proprietors, etc., 10th Mass., 179.
Chandler vs. Simmons, 97 Mass., 508.
Jordan vs. McKenzie, 30 Miss., 32.
Murphy vs. Orr, 32 Ills., 489.
Ballance vs. Rankin, 12 Ill., 419.
Gillett vs. Stanley, 1st Hill N. Y., 121.
Holmes vs. Seely, 17th Wend., N. Y., 75.

In this connection it is important to note that the Nebraska Statute of Limitations above quoted, is neither a statute of presumptions nor a statute of repose, but that under its provision, adverse possession operates as a conveyance of the estate to the adverse occupant. Thus in Tourtelotte vs. Pearce, 27th Neb., 57, the court say that:

"The title of the original owner is unaffected and untrammeled until the last moment; and when it is vested in the adverse occupant by a completion of the statutory bar, the transfer has relation to nothing which preceded it. * * * The operation of the statute takes away the title of the owner and transfers it in legal effect to the adverse occupier; and the one who purchased the written title of the owner, buys a title which by operation of law was fairly vested in the adverse occupant." And in this case it was held:

"A party who has been in the actual, open, notorious, exclusive and adverse possession of real estate for ten years, thereby acquires an absolute title to such real estate, and may maintain an action to have certain deeds which are clouds upon the title, set aside and declared void, and quiet his possession in the premises."

The title of the adult children of Jacob Dawson, therefore, who obtained their majority more than ten years before the beginning of this action, is vested in the plaintiff in error as effectually and to the same extent as though after becoming *sui juris* they had conveyed their undivided shares to him by deed.

The consequence will be the same if it shall be held that the children are tenants in common instead of joint

tenants of the estate in remainder. The petition in this action is required by the statute, above quoted, to describe the estate which the plaintiff has in the land. This petition does not describe an estate in an undivided two-fifths of the lands, but lays claim to the whole of the tracts. It might well have happened that the defendant (plaintiff in error), if the claim had been but for an undivided two-fifths, would have yielded without defense. The variance is therefore fatal, and to this effect are the foregoing authorities. Say the court in Ballance vs. Rankin, 12th Ills., 420:

"The language of the Statute is plain and explicit. It admits of but a single meaning. It is imperative and not directory. These provisions were made for some substantial and practical purposes, and they are founded on very good reasons. The declaration apprises the defendant of the precise character of the estate sought to be recovered against him. If he finds that he cannot successfully resist the claim, he may let judgment pass by default and thus save the expense and trouble of further litigation. Or if he chooses to make a defence, he has only to come prepared to meet and resist a particular, not a general claim; but if the statute is to be regarded as directory merely, and the plaintiff is not bound by affirmations in his declaration, these provisions will become wholly inoperative and cease to answer any useful or practical purpose. The plaintiff will declare generally in all cases, and a contest will be unavoidable whenever he is not entitled to the estate in fee of the whole of the premises described in the declaration. We hold that the plaintiff is bound by his allegations. He must recover according to the case made in his declara-

tion. He cannot recover a different estate than the one he claims. If he claims an estate in fee, he cannot recover a less estate. If he claims an estate for life, he cannot recover an estate in fee or for years. If he claims an estate for years, he cannot recover an estate for life or in fee. If he demands the whole of the premises, he cannot recover an undivided interest therein. If he demands an undivided share, he connot recover a different estate."

III.

The citizenship of the parties was denied by the answer, and not found by the verdict.

N. S. HARWOOD,

JOHN H. AMES,

Attorneys for Plaintiff in Error.

MAR 31 1892
JAMES H. McKENNEY
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1891.

No. 285.

ARTEMAS ROBERTS, PLAINTIFF IN ERROR,

vs.

WALTER F. LEWIS, DEFENDANT IN ERROR.

Supplemental Brief for Plaintiff in Error.

N. S. HARWOOD and JOHN H. AMES,

Of Counsel for Plaintiff in Error.

CALHOUN & WOODRUFF, PRINTERS, LINCOLN, NEB.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 285.

ARTEMAS ROBERTS, PLAINTIFF IN ERROR,

vs.

WALTER F. LEWIS, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

N. S. HARWOOD and JOHN H. AMES of Counsel for Plaintiff in Error.

The defendant in error devotes eleven out of the thirty-six pages of his briet, or nearly one-third thereof, to an elaborate effort to get rid of this case upon a technicality.

A technicality is an excuse, more or less plausible, for the denial of justice.

The particular technicality pointed out in this case is that the plaintiff in error neglected to prepare and preserve a bill of exceptions.

The excuse of the plaintiff in error for this omission is that the errors of which he complains sufficiently appear upon the face of the record without the aid of a bill of exceptions.

The facts are recited in the special verdict, which is in conformity with the practice both of the state and of the federal courts.

There is no complaint that the facts are not as recited, or that any error intervened in the preceding trial. The special verdict having been returned, it became the duty of the Circuit Judge to pronounce the judgment of the law thereon.

Neither the state nor the federal practice requires that he should be moved to do so by either party, either orally or in writing.

If there was such a requirement, a judgment rendered in the absence of such a motion would be erroneous, and reversible for that reason. Hence, in such case the motion would, like the pleadings, be an essential part of the record, and no bill of exceptions would be requisite to preserve it. The argument of counsel upon this point is, therefore, self-contradictory or absurd.

The plaintiff in error complains that the judgment is erroneous because it is not a correct application of the law to the facts found by the verdict. To the judgment the writ of error is an exception.

The office and object of a bill of exceptions have been twice elaborately described by this Court. We quote for the instruction of counsel from Suydam vs. Williams, 20 Howard U. S., 427:

"After the special verdict is arranged, and it is reduced to form, it is then entered on the record together with the other proceedings in the cause, and the questions of law arising on the facts found are then decided by the court, as in case of a demurrer; and if either party is dissatisfied with the decision, he may resort to a court of error, where nothing is open for revision except the questions of law inferentially arising on the facts stated in the special verdict; and we here remark, for the purpose of illustration, that it is not so much because the proceeding is denominated a special verdict, that the party by virtue of it is authorized to invoke the aid of a revisionary tribunal, as it is because it has the effect to incorporate the facts of the case into the record, which otherwise would have rested in parol, and therefore could not have been reached on a writ of error; and the same remark applies to a bill of exceptions which is a still more comprehensive method of enlarging the record by incorporating into it not only the facts of the case, but the rulings of the court in admitting and rejecting evidence, and the instructions given to the jury; and after it is signed, sealed, and filed in the case, it becomes a part of the record, and the matters therein set forth can no more be disputed than those contained in any other part of the

same record, and are alike subject to revision in a court of error. It is a mistake, however, to suppose that in such cases the writ of error operates only on the bill of exceptions. Such is never the fact, unless the whole record is set forth in the bill of exceptions; as the operation of the writ of error addresses itself to the record as an entirety, and not to any separate portion of it as distinct from the residue; and when then cause is removed into the appellate court, any error apparent in any part of the record is within the revisory power of such tribunal. The rule is that whenever the error is apparent on the record it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner."

And in Mumford vs. Wardwell, 6 Wallace U. S., 423, the court say:

"Special verdicts having a conditional or alternative finding are the proper foundation of a judgment for either party, as the law of the case on the facts found may require, and consequently the judgment of the subordinate court on such a verdict, whether for plaintiff or defendant, may be re-examined in the appellate tribunal without any bill of exceptions."

II.

Upon the second point little or nothing can be added to what has already been said.

As to this contention, plaintiff in error rests upon the doctrine of Suydam vs. Williams, 24 Howard, U. S., 427, cited in our former brief; and upon the proposition laid down in Leffingwell vs. Warren, 2 Black, 599, that: "The construction given to a statute of a state by the

highest tribunal of such state, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." The statute here in questioned, had been construed before its adoption by the legislature of Nebraska, and its construction was adopted with it.

It seems to us that it would be intolerable that there should be two systems of land titles within a single state jurisdiction, derived from a single source and divergent merely because of a difference in judicial construction; so that, of parties claiming under the same right, some should succeed and some should fail because of the accident of forum; but this matter we are content to leave without further discussion, to the determination of your honors.

As counsel have, however, stepped outside of the record to say that the defendant in error purchased, in reliance upon the construction given to the will by this court, we will follow him long enough to say that he did not purchase until after he had knowledge of a contrary construction, which had been given by the Nebraska District Court, and which was afterward confirmed by the State Supreme Court.

III.

A plea to the jurisdiction or other plea in abatement is unknown to the Nebraska practice. Under that practice every allegation in the plaintiff's petition which is essential to enable him to maintain his action, is put in issue by a general denial. Under that practice all pleas are

pleas in bar, and if a plea to the jurisdiction should be filed unaccompanied by matter in defense upon the merits, which at common law would, if inserted, be held to waive the matter in abatement, and the defendant should be defeated upon the issue to the jurisdiction, judgment would go against him absolutely. There could be but one trial, and but one verdict. If your honors shall hold that in this state objections to the jurisdiction must be taken by preliminary pleas in abatement, defendants will in all cases be compelled either to rely solely upon such objections, or to waive them; or else your honors will be called upon to introduce an exception into the act of congress which provides that: "The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

This court has repeatedly held that jurisdiction must appear affirmatively on the face of the record, and that an omission in this respect cannot be waived or cured by consent. Thus in Metcalf vs. Watertown, 128 U. S., 586, the Court say: "But whether that (the circuit) court had or had not jurisdiction, is a question which we must examine aud determine, even if the parties forbear to make it, or consent that the case be considered upon its merits." And in Parker vs. Ormsby, 141 U. S., 81: "In the exercise of its power, this court of its own motion must deny the jurisdiction of the courts of the United States in all cases coming before it upon writ of error or appeal,

where such jurisdiction does not affirmatively appear in the record on which it is called to act."

But how can anything be said to appear affirmatively or to appear at all, which is merely asserted by one party and denied by the other? and how can one be said to waive the proof of an alleged fact, the existence of which he denies in a sworn answer? The cases in which this court has held that want of jurisdiction must be availed of by way of plea in abatement arose in states in which a code of practice has not been adopted, and where therefore common law pleas are allowable.

In Donavan vs. Fowler, 17th Nebraska, 247, it is held: "An answer consisting of a general denial of each and every allegation in the petition, places in issue all the allegations contained therein."

And in Hassett vs. Curtis, 20th Nebraska, 162, the court say: "The answer contained a general denial of the allegations of the petition; this requires proof upon every material allegation therein not admitted of record to be true."

In Bliss on Code Pleading, paragraph 345, it is said: "The Code requires the defendant either to demur or answer, and in his answer he must set up as many defenses as he may have. Only one answer is contemplated, and all the defenses, which he has or which he elects to make must be embraced within it. Matter in abatement is as much a defense to the pending action as matter in bar, and to say that the defendant may reserve

the latter until a trial shall have been had upon the issues in regard to the former, would interpolate what is not in the statute: would be inconsistent with its plain and simple requirements." Citing Swett vs. Tuttle, 14 N. Y., 465; Gardner vs. Clarke, 21 N. Y., 399; Thompson vs. Greenwood, 28 Indiana, 327; Freeman vs. Carpenter, 17 Wisconsin, 126; Dutcher vs. Dutcher, 39 Wisconsin, 651.

When the jurisdiction of the court depends upon the citizenship of the parties, it seems to us that it must be a sufficient plea in abatement for the defendant to deny the alleged citizenship; and it is clear from the foregoing authorities, that under the Nebraska practice, he must join such denial with his answer to the merits, or else waive the latter.

IV.

Counsel seem to have entirely misapprehended our position upon the force of the statute of limitations, and to have overlooked the authorities cited in our former brief, from which it appears that this cause of action accrued, if at all, in March, 1870, more than ten years before the beginning of this suit; at which time several of the children of Jacob Dawson had attained their majority.

N. S. HARWOOD and
JOHN H. AMES,
Of Counsel for Plaintiff in Error.

MAR 12
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

No. 995.

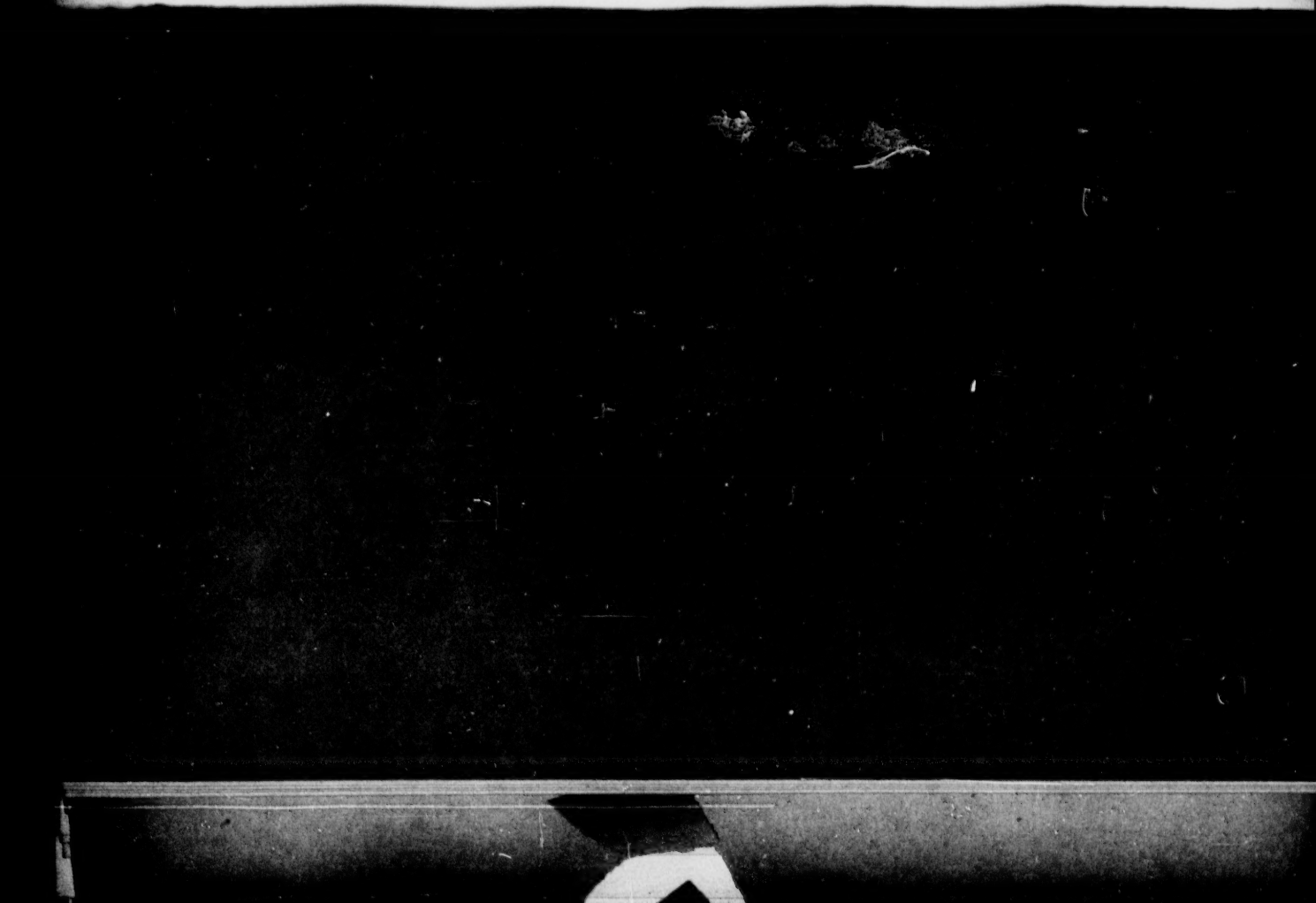
ARTEMAS ROBERTS,
Plaintiff in Error,

v.

WALTER F. LEWIS.

BRIEF FOR DEFENDANT IN ERROR.

J. M. WOOLWORTH,
L. C. BURR,
Of counsel for defendant in error.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

No. 285.

ARTEMAS ROBERTS,
Plaintiff in Error,

v.

WALTER F. LEWIS.

BRIEF FOR DEFENDANT IN ERROR.

This is a writ of error to the Circuit Court of the United States for the District of Nebraska. It was an action of ejectment brought in that Court on the 11th of June, 1887, to recover the possession of certain premises in Dawson's Addition to South Lincoln, in Lancaster County, Nebraska.

In pursuance of the statute of that State, the petition after stating the usual jurisdictional facts, alleges that the plaintiff has a legal estate in the premises described, and that the defendant has lawfully kept and still keeps the plaintiff out of the possession thereof.

The answer alleges the statute of limitations of the State, and denies each and every allegation in the petition. The trial was before the Hon. Elmer S. Dundy, Judge, and a jury upon these issues. It resulted in a judgment in favor of the plaintiff, rendered on the 2nd of April, 1888. No bill of exceptions was saved on the trial. By direction of the Court, the jury returned a special verdict, finding that Jacob Dawson at his death, was seized of the premises, and left his last will, made on the 10th of May, 1869, whereby he devised all his estate to his wife, Editha J., "the same to be and remain her's with full power, right and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow, upon the express condition however, that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, shall go to my surviving children, share and share alike;" that on the 15th of March, 1870, Mrs. Dawson, by her attorney in fact, conveyed the premises to one England, who, on the 15th of December, 1871, conveyed them to the plaintiff in error, Roberts, who has ever since been in the peaceable occupation and possession of the same; that on the 14th of December, 1879, Mrs. Dawson married one Pickering; that three months before that event, the children of Jacob Dawson conveyed the premises in fee to Highland H. Wheeler and Lionel C. Burr, with warranty; and that they afterwards conveyed with warranty to Ezekiel Giles, who, in May, 1887, conveyed with warranty to the plaintiff. Thereupon, the jury found that if

Mrs. Dawson took an estate determinable upon her marriage, the plaintiff, Roberts, was seized of the premises in fee, and was entitled to recover; on the other hand, if the Court was of the opinion that she took an estate in fee, then it should find for Lewis. Each party filed his written motion for judgment upon the verdict and special findings of the jury. Afterwards the Court overruled the motion of the defendant, and sustained that of the plaintiff, and gave plaintiff judgment. No exception was taken or reserved by the plaintiff in error to the ruling of the Court upon the motion for judgment, or to any other ruling, nor was any bill preserved.

FIRST POINT.

There is nothing in this record for examination by the Court, because no exception to any ruling on the trial, or the testimony or any part of it was saved by bill, or otherwise made a part of the record. All that we have, is a paper which is set out on page 3, called "Instructions requested by defendant," from which it appears that he asked the Court upon the whole testimony to direct a verdict for him, and also that the statute of limitations was a bar to the interests of certain of the heirs of Jacob Dawson. These requests appear from this paper to have been refused. To it is added a memorandum signed by the judge that "special findings are to be returned by the jury." This paper cannot be considered, for without the whole testimony the

questions presented by the requests cannot be determined. But even if we had testimony which would support the requests, there is no exception to the refusal. This paper has no place in this record and must be disregarded. This Court has ruled this point so many times, that it does not need attention.

Baltimore, &c., R. Co. v. Trustees, 91 U. S., 127-130.

2. The jury returned a special verdict under the direction of the Court, "after hearing the evidence, arguments and charge of the Court;" thereupon the plaintiff filed his motion for judgment in his favor upon the special verdict; and the defendant also filed his motion for judgment in his favor upon the verdict and special findings in this case. These motions were submitted to the Court for its consideration; and "after being fully advised in the premises," the Court ordered "that the motion of the defendant be overruled, and the motion of the plaintiff be sustained." To this order, there was no exception taken. Neither of the two motions were made part of the record by bill, nor was the ruling of the Court thereon excepted to by the defendant, nor was that exception saved. The two motions having been then ruled by the Court, judgment followed, accordingly. Such being the state of the record, it does not present to this Court the question whether the action of the Court below was correct or erroneous.

(1). It is evident that the plaintiff must have introduced evidence to support his action, for without it the jury

could not have found the verdict; but what that evidence was, this Court cannot know. On the other hand, the presumption will be not only that Jacob Dawson made his will and died leaving certain persons his children from whom by mesne conveyances the plaintiff acquired his title, but also such other collateral facts and circumstances as may support the verdict. Nor are we left simply to the presumption, conclusive as it is, which we have stated; for it distinctly appears that a jury was impanneled and that it heard evidence; without that evidence this Court cannot say whether the ruling of the Court upon the two motions was right or not. For the purpose of illustrating this matter more fully, let it be supposed that Mrs. Dawson, at the death of her husband was seized of large real and personal estate, much greater than those of which he died seized and possessed, and that he was apprehensive that she would marry a particular person offensive to him, and entrust her second husband the estate dealt with by the will, leaving his children unprovided for and framed this will for the purpose of saving to them, what his industry and enterprise had accumulated. For the same purpose, let other circumstances of the same or like character be supposed to have been proved on the trial and considered by the Court and jury. Such testimony would be very persuasive with the Court in directing its judgment upon the motions. Without knowing what such considerations were, and how far the trial judge was moved thereby, it is

impossible for this Court to put itself in his place; without doing which, it cannot rightly determine the correctness of his ruling upon the motions.

(2). If the Court should be of opinion that it must determine the correctness of the ruling upon the findings of the jury without taking account of the evidence adduced upon the trial, it still remains that the exception was necessary in order to a re-examination of the case here. This Court has so held more than once.

Young v. Martin, 8 Wall., 354, presents this exact question. The action was brought in a District Court of the Territory of Utah. It appeared from minutes of the clerk that a demurrer was filed to the defendant's answer, which was taken by the Court, under advisement; afterwards, the demurrer was overruled, and the plaintiff ordered to reply, and that to this ruling the plaintiff excepted. It further appeared that the plaintiff's counsel verbally moved for judgment on the pleadings; that this motion was argued and submitted to the Court, and afterwards overruled, and that plaintiff's counsel again excepted. Mr. Justice Field delivered the opinion of the Court and said that there was no evidence contained in the transcript that any exceptions were taken to the action of the District Court, except such as appears from the minutes of the clerk. The learned judge proceeds to say that these entries do not present the action of the Court and the exceptions, in such form that this Court can take notice of them. After considering the proceedings further, the

learned judge addresses himself to the exception taken to the ruling in denying the motion for judgment on the pleadings, and he said "that it is not only subject to the general objection already stated, but to the further objection that the grounds upon which the motion was made or denied are not given. The motion was not made at the trial; and, as counsel suggests, it may have been denied on a point of practice without respect to the merits." This case is decisive upon the point under consideration; namely, that when a motion is made and ruled by the trial court, it can not be considered here, unless an exception is saved by bill. This is what the Court held in *Knapp v. the Railway Co.*, 20 Wall., 117. The case was originally brought in a State Court, and removed into the Circuit Court. The Western Vermont Railroad Company issued, a large amount of bonds secured by its mortgage of the road to Knapp & Briggs; both being citizens of New York. The mortgage was foreclosed, and the trustees acquired the road in trust for the bond-holders. They leased it to a New York corporation. Afterwards, a majority of the bond-holders, was, in pursuance of a State statute, formed for the purpose of obtaining the title, ownership, use and benefit of the estate, and of taking possession thereof. The trustees sued the lessee upon the covenants in the lease; thereupon the defendants insisted that the new corporation had become substituted in place of Knapp & Briggs as trustees, and upon an affidavit of local prejudice, asked the State Court to remove the cause into the Circuit Court; contending that

the controversy was between the new company, a Vermont corporation, and themselves, a New York corporation, and that Knapp & Briggs were nominal parties. The cause was removed, and the Circuit Court was moved to remand the cause for want of jurisdiction. The motion was denied and judgment rendered for the new company. The transcript contained the papers on which the order for removal was founded, and those filed in support of the motion to remove, and, in addition thereto, a statement of the clerk, not authenticated in any way by the judge or appearing in a bill of exceptions, which, according to the statement, were proved on the hearing, and also different things which were admitted or agreed to by the parties respectively. Mr. Justice Davis delivered the opinion of the Court, in which he said:

"In the consideration of the question whether or not the Circuit Court had the right to try the case, we are confined to the papers sent up with the order for removal and the papers filed in support of the motion to remand. If anything occurrred on the hearing of this motion, which ought to have been preserved, it has not been done, for there is neither a bill of exceptions nor an agreed case in the record. It is true, the clerk makes a recital, running through nearly three pages of the transcript, of the various matters which, he says, were proved on the hearing of this motion, and of certain stipulations and admissions. These recitals form no part of the record and cannot be considered by us. They are not even authenticated by the signature

of the judge, nor could they be, to be made available here, except through the mode of a bill of exceptions.

"Although this manner of making entries by the clerk is improper and unauthorized, yet the party to the record in whose favor they are made, cannot gain by them, or the party against whom they are made be injured by them. If either party, in an action at law, is desirous of preserving the evidence, either at the trial or on a preliminary motion, in order to raise a question of law upon it, he must ask to have it incorporated in a bill of exceptions. This is the only way in which it can be done, unless the parties choose to make an agreed statement of facts. Neither mode was adopted in this case; and we are, therefore, without means of knowing what evidence was introduced on either side on the motion to remand. The question of jurisdiction is, therefore, to be decided on the papers properly in the record."

This case, therefore, decisively settles the practice that the rule as to exceptions upon an order made on a motion is the same as on any other ruling in the course of the trial.

(3.) If it be said that this is not true when the question is necessarily presented in the record, we answer that without a motion by one party or the other, or motions by both, as in this case, and a full hearing of the respective counsel thereon, no judgment could be entered. The verdict would lie without action, unless called to the attention of the judge; nor would he render judgment thereon with-

out hearing counsel or at least giving them opportunity to be heard. This shows decisively that the action on behalf of the parties, or at least of one of them against the other, was necessary in order to the final disposition of the case. The record was not one upon which the Court would proceed without some affirmative act of one or other of the parties; and in all such cases, its ruling must be challenged by an exception, in order to be liable to review here; the defendant below will not be permitted to himself raise a question by a formal motion filed in the Court, and then turn his back upon the proceedings and leave them until after judgment, and for the first time make his objection here.

(4.) The case is not within the rule laid down by this Court in the *Moline Plow Co., v. Webb*, 141 U. S., 616. That was an action upon a promissory note and the plea was the statute of limitations. The plaintiff's original and supplemental petitions showed that the case was not within the statute. No evidence appears to have been adduced upon the trial, which was to the Court without a jury; there were no special findings. Upon the pleadings, the Court held the action barred. Of course there was nothing here which could be saved by bill; no more than where a petition stated a cause of action which the defendant thought barred, and he demurred on that ground. In such a case, the whole question appears upon the record. Here, we have a trial to a jury upon issues joined in such wise as to make testi-

mony necessary for the maintenance of the action, and a recital that evidence was adduced and a finding of a jury thereon, and, last of all, motions on the part of the plaintiff and the defendant and a ruling thereon, distinct and separate from the judgment.

An error upon the face of the record cannot be made more apparent by bill of exceptions, whose office is to make of record what is not thereon. The question is whether what is here alleged for error appears upon the record. The ruling was upon a motion without which the trial court would not act. So that the answer to the question is that the motion not of itself being matter of record, must be brought thereon by bill of exceptions.

SECOND POINT.

Jacob Dawson died seized of the premises in question, leaving a will by which he devised all his estates, as set forth in the statement. This will was before this Court for construction at its October term, 1881, in the case of *Giles v. Little*, 104 U. S., 291. It was there unanimously and upon careful consideration held, that the widow took an estate for life determinable upon her marriage, with remainder in fee to the children of the testator. Mrs. Dawson, having in December, 1879 married again, the children of the testator became at that time seized of the premises in fee. In May, 1887, the plaintiff below acquired the title of the children.

This action was brought in the Circuit Court for Nebraska, on the 11th of June, 1887, and judgment was rendered in favor of the plaintiff on the 2d of April, 1888. At its January term, 1889, in a case then before it, the Supreme Court of the State of Nebraska, rendered a judgment, construing the same will as giving the widow the fee and power to convey the same before her remarriage.

Upon these facts, this Court should adhere to its judgment, and not yield to that of the State Court above mentioned.

The general rule is that the laws of the several States shall be regarded as rules of decision in the Federal Courts in cases to which they apply, except where the Constitution, treaties or Statutes of the United States otherwise require or provide. In trials at common law this is prescribed by Statute. In suits in Equity and Admiralty, it has been established by a long course of decisions. It is of equal force and application in all the jurisdictions of the Federal Courts.

But stated in these general terms, the rule leaves many interesting questions. One, and a radical one is, what are the laws of the several States which shall be rules of decision in the Federal Courts. When that is ascertained, nothing remains for this Court but to apply it to any case before it for decision. The constitution and the statutes of a State are laws within the rule. So are the customs of the people, and a long uniform course of action on the part of the legislative and executive departments of the

government. But it happens every day that men, well learned and honest men differ about the meaning of constitutional and statutory provisions. It becomes necessary to submit these differences to the Courts and their decisions are evidences of the laws. Men resort to them to learn the meaning of constitutional and statutory phrases, just as they resort to other sources of information to learn what are the customs of the people and the policy of the legislation and the administrative officers. We go to the judicial decisions for the interpretation of the written provisions, just as we do to the marts to learn the customs of commerce; and in both cases for the same purpose. That purpose is always to ascertain what the laws of the State are.

Almost always questions of local law arise in the local Courts before they do in the National Courts. This is natural; and when the decisions in the former have been made in such wise as to be definitive, it is the duty of the latter to accept them and apply the law as expounded by them to proper cases; and this because the law of the State is as its Courts have declared. But sometimes the judges of the State Courts differ in their view of the law; as many of them may hold one opinion as hold the other opinion. The particular case before them for judgment may be decided one way or the other, but the diversity of opinion leaves the principle where it was before the dispute arose. Of course in such conditions the Federal Courts are as free to act as if the question was first raised in them. So, too,

sometimes the State Courts after holding the law to be one way in a line of decisions, longer or shorter, changes its opinion and holds it to be another way. This sets the matter at large and leaves this Court to ascertain for itself what the law is, or to critically examine the local decisions to ascertain what they settle.

When for any such reason the State Courts have not spoken a decisive language, or, when, as some times happens, because the question has not been presented to them, they have not spoken at all, and the Federal Courts are called by a case before them to administer the local law, their duty is to ascertain what it is for themselves. Their duty is just as imperative and their competency is just the same as those of the State Courts. Their decisions on questions of local law are as binding, not only upon the parties to the case in which they are rendered, but upon all other citizens, as that of the local court.

Some have thought there is a degree of indefiniteness in the doctrine of this Court on the subject. Possibly some inconsistency may be found in its different expressions. But the cases do not show that this Court has ever yielded its judgment to that of a State Court when it has deliberately spoken first. The question always being what is the local law, this Court always, in obedience to the spirit of the general rule, accepts the exposition of it by the local court, if such exposition has been given. But if this Court is, by the exigencies of an orderly litigation, first called on to determine the local law and it does so, it does not yield

its judgment to that of a local court afterwards pronounced, save only when, as in all other cases, it becomes satisfied upon its own independent examination that it has fallen into error.

That statement is borne out by the cases. *Grover v. Slaughter*, 15 Peters, 449, (1841), and *Rowan v. Runnels*, 5 How., 134, (1847), should for our present purpose be considered together. Each was an action on a promissory note, given in Mississippi upon a sale of slaves, imported in 1835 and 1836 into that State, as merchandise, for sale generally to any one who might wish to purchase.

In 1832 the constitution of the State was adopted containing this provision: "The introduction of slaves into this State as merchandise or for sale shall, be prohibited from and after the first day of May, 1833," with a proviso not material here. It was contended that the notes were illegal and void under this law. On the other hand it was contended that the inhibition could not take effect without legislative action. The question was the same in the two cases, although presented in different ways, which is a circumstance not of consequence. The first case was very elaborately argued by the most eminent counsel.

Mr. Justice Thompson delivered the opinion of the Court. The very first subject he deals with is "the argument" made "by way of preliminary objection to an examination of the construction of the Constitution" by this Court, "that this article has received a judicial interpretation in the Courts of Mississippi, which, according to the

doctrine of this Court with respect to State decisions upon their own laws and Constitution, will control the judgment of this Court upon this question." He then examines the case decided by the State Supreme Court, which was cited in support of this contention, and finds that there was such diversity of opinion among the judges as to justify this Court "in considering that the construction of the Constitution in that state is not so fixed and settled as to preclude us from regarding it an open question." He then enters upon an original examination of it, and reaches the conclusion that the prohibition did not become operative because there was no legislative action carrying it into effect. Under this ruling the note was valid and judgment thereon was for the holder against the maker.

After that decision in this Court, the same question came before the State Supreme Court which held that the article of the Constitution was of its own vigor in force, and a note for slaves imported after the day fixed in the article was illegal and void, although there was no legislation on the subject. After that, *Rowan v. Runnels* came here from the Circuit Court for Mississippi, and the State decision was strongly pressed upon this Court as the end of the contention. Mr. Chief Justice Taney delivered the opinion of the Court, Mr. Justice Daniels alone dissenting. After stating the opinion in *Grover v. Slaughter*, the Chief Justice says: "It now appears, however, that the question has since been brought before the Courts of the State, and it has been settled by its highest tribunals

that the clause in the Constitution above referred to, did of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale, and rendered all contracts for the sale of such slaves made after May 1st, 1833, illegal and void. And it is argued that inasmuch as this Court adopts the construction given by the State Courts to their own Constitution and laws, we ought to follow the decisions in Mississippi, and declare the case before us to be void, notwithstanding the case of *Grover v. Slaughter.*

"But we are not aware of any decision in this Court which presses the rule so far, or that would justify this Court in declaring contracts to be void upon this ground, which, upon the fullest consideration, it has so recently held to be good."

The learned judge returns to *Grover v. Slaughter* and states with care the reasoning therein, and continues by stating the rule that this Court follows the State Courts in their construction of their Constitution and laws, and concludes thus: "But we ought not to give them a retroactive effect and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this Court, were lawfully made. For if such a rule were adopted and the comity due to State decisions pushed to that extent, it is evident that the provision in the Constitution of the United States, which secures to citizens of another State the right to sue in the Courts of the United States, might become utterly useless and nugatory.

"We are of opinion, therefore, that the decision in the case of *Grover v. Slaughter* must rule this case."

In *Pease v. Peck*, 18 How., 595, Mr. Justice Grier delivering the opinion of the Court, discussed somewhat at large this question, and at page 599 said: "But when this Court has first decided a question arising under State laws, we do not feel bound to surrender our convictions, on account of a contrary subsequent decision of a State Court, as in the case of *Rowan v. Runnels*, 5 How., 139."

Morgan v. Curtinius, 20 How., 1, was ejectment brought in the Illinois Circuit. The plaintiff claimed under a patent issued to Bogardus in 1838. The defendant claimed under a deed made by Bogardus in 1834, purporting to "grant, sell and convey" all of the interest of the latter, and also proved that the defendant paid Bogardus the consideration and took out the patent in the latter's name. The plaintiff moved to exclude all of the defendant's evidence, which motion was overruled and this is the error complained of. It was contended that the deed was simply a quit claim which did not estop the plaintiff to allege the after acquired title under the patent. There was a statute to the effect that a grantor, by deed purporting to convey a fee, not having the legal title at the time but afterwards acquiring it, shall be taken to hold the same in trust for his grantee, and his deed be taken to be as valid as if he had the legal title when he made the same.

The case was tried at the Circuit on the 8th of June, 1849. In 1845 the Supreme Court of the State in a case

then before it construed the statute and held that under it the after acquired title inured to the grantee. Mr. Justice Grier delivered the opinion of the Court; and, after stating the facts as above briefly recounted, said at this point, "This construction of the statute was therefore a settled rule of property at the time of the decision of this case in the Court below, which that Court was bound to follow; and having so decided there was certainly no error in the decision at the time it was made."

But in 1853 another case came before the State Court in which the same conveyance and the same statute were in question as in the former and received a contrary construction. The learned judge then says: "If the judgment of the Circuit Court in this case had been given since the last decision of the Supreme Court of Illinois, this Court might have been compelled to decide whether they considered themselves bound to follow the last decision of that Court or was at liberty to choose between them. But, however the latter decision may have a retroactive effect upon the title held under the deed in question, it cannot have that effect upon decisions of the Circuit Court, and make that erroneous which was not so when the judgment of that Court was given."

The case which must always be considered as concluding this question is *Burgess v. Seligman*, 107 U. S., 20. It has been cited with approval in every case which has since been before this Court, and in which, in any of its phases, the question has been presented. The opinion

delivered by Mr. Justice Bradley was the unanimous judgment of the Court. That great judge brought his best powers to the subject. His examination of the decisions was exhaustive as is shown by the citation, in the margin, of almost every previous case; his discrimination was characteristic; and his expressions were as exact and pregnant and strong as in any of his judicial writings.

The case was upon a statute of Missouri, providing that stockholders of a company at its dissolution should be liable for its debts, except executors, &c., and holders of the stock as collateral security. A railroad company of that State was dissolved, leaving unpaid debts. The Seligmans held certain of its stock, and were entered on its registry as holders with a memorandum "in escrow." They took it under a contract with the company, stating that the stock was to remain in their hands for at least a year. They were to buy 2,000 tons of iron for the company's railroad, and to advance $200,000 at 7 per cent. interest. The entire issue of the company's first mortgage bonds was also deposited with them upon certain specified terms. Holding the stock in this way, they were charged by the plaintiff, a judgment-creditor of the company, as holders of the stock at the time of its dissolution. This was the question in the case. The Circuit Court held that they were not liable, and dismissed the action. Pending a writ of error from this Court, the Supreme Court of Missouri delivered two judgments adversely to that of the Circuit Court; and to the views expressed by the learned justice in

his examination of the facts. He states that one of them seems to have been very fully and carefully considered, and was substantially followed and confirmed by the other. Upon the point now under discussion the opinion is familiar to the Court and need not be quoted at length. The explication of it concludes with these words:

"In the present case, as already observed, when the transaction in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions upon which the Circuit Court was called upon and which we are now called upon to consider. It can hardly be contended that the Federal Court was to wait for the State Courts to decide the merits of the controversy and then simply register their decision; or that the Circuit Court should be reversed merely because the State Court has since adopted a different view. If we could see fair and reasonable grounds to acquiesce in that view we should gladly do so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion.

"*Pease v. Peck*, 18 How., 595, and *Morgan v. Carteneir*, 20 Id., 1, in which the opinions of the Court were delivered by Mr. Justice Greir, are precisely in point."

It would serve no useful purpose to cite other cases to the same effect, or to seek to support by any reasoning what may be now considered one of the institutes

of the law. There are cases which are sometimes cited as holding another doctrine, but an examination of their facts will show that they are entirely consistent with the judgments cited above.

The controversy in the case of *Williamson v. Suydam*, was before this Court several times, and an account of it will be useful. In 1802 Mary Clarke died seized of the lands in dispute leaving a will devising the same to Benjamin Moore and his wife, who was the daughter of the testatrix, and Mrs. Maunsell, in trust to receive the rents and pay them to Thomas B. Clarke, a grandson of the testatrix, during his life time, and at his death to his issue then living in fee; and if he died without issue, then to Clement C. Moore in fee. In 1814 the legislature of New York by an act discharged the trustees, on account of their inability to act from infirmity of health and other causes, and empowered the Court of Chancery to appoint others in their place, who should divide the land into two equal parts, one of which they should hold upon the trusts declared in the will, and to sell the other and invest the proceeds, holding the principal for the same uses and paying the interest to Thomas B. Clarke. This measure proving ineffectual to the purposes for which that act was passed, in 1815 another was enacted, authorizing him to act as trustee and providing that no sale by him should be effectual without the chancellor's approval. Afterwards, in that year, Chancellor Kent authorized Clarke to sell the eastern moiety. In 1816 another act was passed authorizing Clarke, under the Chan-

cellor's order, to mortgage or sell the southern moiety, applying the proceeds to the purposes required by the Chancellor under the former acts. In 1817 the Chancellor made an order accordingly authorizing Clarke to convey any part of the southern moiety in satisfaction of debts, upon a valuation to be made as therein provided. In 1818 Clarke conveyed the premises to McIntyre, under whom Snydam held. During all this time Clarke had infant children. The legislation and orders mentioned were obtained at his instance with the consent of all concerned except these infants. In 1826 Clarke died leaving these children. They sought to recover these premises, claiming, among other things, that the acts were unconstitutional, and the Chancellor's orders were void for that reason, and because the orders were unauthorized by these acts. This controversy was first raised in the State Courts. The action was ejectment. The lessor of the plaintiff, Moses Field, claimed upon a mortgage made by Clarke, and a decree of foreclosure sale and master deed; the defendant claimed under a lease made by the original trustees. The validity of the acts of the legislature and the orders of the Chancellor was thus drawn in question, and the judgment was for the plaintiff. The case was then taken to the Court of Errors and is reported under the name of *Sinclair v. Johnson* in 8 Cowen, 543. The Court declined to express an opinion upon the validity of the legislation and the judicial proceedings, deciding the case on other grounds. This was in December, 1826.

The next case was *Clarke v. VanSurlay*, 15 Wend., 439, (1836). This was also an ejectment brought by one of the children of Thomas B. Clarke. The defendant claimed under the latter, acting under the acts and orders above mentioned. The Supreme Court held the acts constitutional and valid, and that the children could not question the validity of the Chancellor's orders in ejectment on the ground of excess of authority; and that they not being void, the remedy was in equity or a Court of Review. The case was then carried to the Court of Errors where it is reported under the style of *Cochran v. VanSurlay* in 20 Wend., 566, (1838), the original plaintiff having married Cochran. Chancellor Walworth delivered an opinion in favor of affirmance, and Senator Verplanck against the same. Upon the vote seven voted to reverse, and twelve to affirm the judgment.

An action in ejectment was then brought in the New York Circuit by Mrs. Williamson, one of the children of Thomas B. Clarke against Barry who claimed under the legislation and orders and proceedings above mentioned, and Clarke's action thereunder. The judges were divided in opinion, and the case came here on certificate made in 1846. Because of the difference between the members of the Court of Errors, this Court did not think itself concluded by its opinion, examined the question as an original one, and found that the orders of the Chancellor were without jurisdiction and that what was done under them was void. The opinion of this Court was delivered by Mr. Justice Wayne,

in the course of which he said that Judge Bronson delivering the opinion of the Supreme Court of the State in 15 Wend., said that the acts of the legislature did not give the Chancellor power to make the order; and that this may be gathered from the opinion of Chancellor Walworth in the Court of Error in 20 Wend., and is intimated by Senator Verplanck as his strong impression. And then the learned justice states a point of difference between this Court and the State Court and says, "our conclusion, however, contrary to their's will be put upon grounds not suggested when they acted upon this case." The State Court had held that a decree in Chancery could not be looked into in a collateral way for the purpose of setting aside rights growing out of it. Admitting the rule, it was held here that the jurisdiction of any Court exercising authority over a subject may be inquired into in every other Court.

Afterwards an action was brought in the Superior Court of New York, presenting the same questions, and was carried to the Court of Appeals, 14 N. Y., 423 (1856). That Court speaking by Denio, C. J., reviewed the judgments reported in 15 Wend., and 20 Wend., and found that they settled the rule and refused to follow the judgment here.

The case reported in 8 How., went back for a new trial, which resulted in a judgment for the plaintiff. It was again brought here, and is reported under the title of *Suydam v. Williams*, 24 How., 427 (1860). Mr. Justice Campbell delivered the opinion. He showed that the State

Court held that the rule was settled by the judgments reported in 15 and 20 Wend., and it was bound to follow them instead of that of this Court. Because the State Court had thus settled the question, he held that under the circumstances this Court was bound to follow it.

The case came here again and is reported in 6 Wall., but what was then ruled is not material here.

Fairfield v. The County of Gallatin, 100 U. S., 47, was an action on County bonds brought at the Illinois Circuit. The bonds were issued in aid of a railroad. The County was authorized by the legislature to donate money for that purpose, and certain officers were empowered to issue bonds therefor, after an affirmative vote of the people on the proposition to that effect. An election was held accordingly and resulted affirmatively. The bonds were issued to the railroad company on the 6th or 8th of October, 1870. The defence was that under the constitution of Illinois, which came into force on the 2d day of July of the same year, counties were forbidden to issue bonds for that purpose, except where the same had been authorized by existing laws by a vote of the people. In 1875, four years before this case was submitted this Court, the same question was presented to it, and it was held here that bonds could not lawfully be issued after July 2, 1870, although they had been authorized by a prior statute and by a vote of the people taken before that day. This Court was not at the time advised of a judgment rendered by the Supreme Court of Illinois, a year before, to the contrary effect

Since then, two cases to the same effect have been determined by the State in the same way, and several legislative acts since passed show that the same view has been held by the legislature. The question was whether this Court would adhere to its former decision rendered in ignorance of the ruling of the State Court, or defer to the opinion of the latter.

Mr. Justice Strong delivered the opinion of the Court, in the course of it he said: "We are not constrained to refuse following the decision of the State Court in order to save rights on the faith of our own ruling." He then traces the course of opinion in the case of *Grover v. Slaughter*, and points out that that case was ruled as it was, in order to save contracts made before the adverse decisions of the State Court, while in the case before him to adhere to its judgment this Court would strike them down.

In each of these controversies this Court yielded its first judgment, because when it was pronounced there were decisions of the State Courts to which their due effect had not been given. In the *Williamson v. Suydam* case this Court thought the courts of New York had not delivered a decisive opinion. But a later judgment showed to this Court that this was a mistake; accordingly this Court hastened to correct its error. In Fairfield's case it appeared that before the first decision here, there was a State decision which was unknown to the judges, for which reason they did not follow it, but held adversely to it. And after that two other judgments were rendered to the same effect.

So that when the case in 100 U. S. came to be decided, the error arising from the oversight was corrected. What this Court did in those cases was what it does in all cases. If it is in any way betrayed into an error in stating the law in one case, it will correct it in another.

The application of the doctrine of this Court that having first examined for itself and decided a question of local law, it will not surrender its independent judgment to a State Court which afterwards holds another opinion for that reason alone, is very easy here. In 1881 this Court construed this will. And in 1888 the Circuit Court for that District, following the opinion of this Court, as it was bound to do, gave us judgment in this case. Afterwards, in 1889, the State Court for the first time had the same will before it and gave it another construction. Nor was this all. In May, 1887, this plaintiff purchased these premises, most undoubtedly relying on the opinion delivered here.

And at this point we are met by another consideration of great consequence. In a long series of cases of various circumstances, this Court, in a jealous care of rights derived from contracts, has uniformly held that if the State Courts have held a certain view of the law upon which contracts have been made and rights have been acquired, and afterwards they have changed their decisions, they will not be followed in the Federal Courts, in cases to enforce those contracts, but the law of the State at the time those rights were acquired will be rigidly applied.

Mercer v. Hackett, 1 Wall, 83.
Gelpcke v. Dubuque, Ib., 175.
Havemeyer v. Iowa County, Ib., 3 Wall., 294.
Thomas v. Lee County, Ib., 327.
Mitchell v. Burlington Ib., 270.
Lee County v. Rogers, 7 Wall., 181.
City v. Lamson, 9 Wall., 477.
Olcott v. The Supervisors, 16 Wall., 678.
Douglass v. The County of Pike, 101 U. S., 677.
Thompson v. Perine, 103 U. S., 806.
—*SC.*— 106 U. S., 589.
Pleasant Township, v. Ætna Ins. Co., 138 U. S., 67.
Clark v. Rives, 139 U. S., 96.

To be sure, this case is not exactly like those cited. When this plaintiff bought these premises, there was no state decision, but the principle is the same. At that time there was a decision of this Court in favor of the validity of the title he was buying, upon that he had a right to rely, and this Court owes it to itself as well as to him to protect him.

There is another reason for this Court adhering to its opinion announced in 1881, instead of yielding to that of the State Court announced in 1889. That reason is that the law involved in those cases is not within the meaning of the rule, that, in the Federal Courts, the laws of the several States are rules of decision. During all the period of the long course of decisions, in which that principle has been declared and followed, it has been held that there are laws of force in the States, upon which this Court has not

only an independent but an entirely free judgment. Questions of commercial law, as in the case of promissory notes, *Swift v. Tyson*, 1 Peters, 1, and policies of insurance, *Carpenter v. Providence Insurance Co.*, 16 Peters, 495, 511; and of the construction of a deed, *Foxcroft v. Mallett*, 4 How., 353, 379; and of private rights which are to be determined on common law principles, *Chicago v. Robbins*, 2 Black, 418, 428; and rights of common carriers, *Myrick v. Michigan R. Co.*, 107 U. S., 102, and many other cases. *Boyce v. Tabb*, 18 Wall., 546, *Hough v. Railroad Co.*, 100 U. S., 226, are not within the rule. To this class belong also cases of the construction of wills.

Lane v. Vick, 3 How., 464, was one of this class. A testator devised to his wife all his personalty at her disposal during her life, and also for her life a tract of land on which he resided, or certain other tracts as she should elect, reserving two hundred acres to be divided into town lots by the executors at their discretion. He also gave to each of his daughters one equal proportion of his personal estate with his wife and sons, and also of his real estate not chosen by his wife. He then provided that the town lots laid off and to be laid off on the two hundred acres, should be sold to pay debts in preference to other property. The wife died shortly after the testator. The question was whether, upon a proper construction of this will, the daughters took an interest in these lots. The Supreme Court of Mississippi, where the testator lived and the lands were situated, held that they did not, and it was urged here that this

Court was bound by that decision. Mr. Justice McLean delivered the opinion of the Court and on this subject said:

"It is insisted that the construction of this will has been conclusively settled by the Supreme Court of Mississippi in the case of *Vick v. The Mayor and Aldermen of Vicksburg*, 1 How. (Miss.) 379. * * * Where, as in the case of *Jackson v. Chew*, 12 Wheat. 167, the construction of a will has been settled by the highest Courts of the State, and had long been acquiesced in as a rule of property, this Court would follow it because it had become a rule of property. The construction of a statute by the Supreme Court of a State is followed without reference to the interests it may affect or the parties to the suit in which its construction is involved. But the mere construction of a will by a State Court does not, as the construction of a Statute of a State, constitute a rule of decision for the Courts of the United States. In the case of *Swift v. Tyson*, 16 Peters, 1, the effect of the 34th section of the Judiciary Act of 1789 and the construction of instruments by State Courts are considered with greater precision than is found in some of the preceding decisions on the same subject."

It cannot be said that the decision of the Supreme Court of Nebraska established a rule of property which this Court must enforce in this case. The rule of property was established here in 1881 and acting upon it this plaintiff bought the premises in question. Not until 1889, eight years afterwards, did any Court hold otherwise.

But it may be suggested that the Supreme Court of the State reached its conclusion as to the meaning of this will adversely to that of this Court, by the application of two statutes, and that for that reason its judgment must rule this case. It would be sufficient to answer that this Court decided what was the proper application of the statute secondly mentioned by the State Court. Mr. Justice Woods, delivering the opinion of the Court in *Giles v. Little*, 104 U. S., 291, 299, said: "It is next insisted by the defendants in error that the statute of Nebraska according to which the will must be construed, favors the construction contended for by them. The statute declares every devise of land in any will hereafter made shall be construed to convey all the estate of devisor therein which he could lawfully devise, unless it shall appear by the will that the devisor intended to convey a less estate. General Statutes of Nebraska, Sec. 124, C. 17. We are at a loss to see how the statute supports the view of one party to this suit more than the other. According to the construction of the plaintiff in error, the devise vested in the widow of the devisor a life-estate, remainder in fee to his children; according to the construction of the defendants in error, it vested the fee in the widow. By either construction the devise conveyed all the estate of the testator in the property devised. This is all the statute demands."

It was the right of this Court to decide the case brought before it in an orderly litigation. In doing so it was also justified in applying the State statute. Not only was this

the right of this Court; it was its duty to do so: as Mr. Justice Bradley says in *Burgess v. Seligman*, *supra*, "it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." When this Court had discharged this imperative duty in the exercise of its jurisdiction, the will was afterwards to be read in the light of its judgment, just as much so as it would have been read in the light of a State opinion announced before *Giles v. Little* came here. Upon that subject we have said above all that we think need be said.

But passing that, let the manner in which Judge Maxwell dealt with the opinion of this Court be noticed. He points out an inaccuracy in the quotation of the statute by Mr. Justice Woods because the word "clearly" is omitted. That will be noticed in a moment. He then says that Mr. Justice Woods gave no weight to the section. The learned Judge who delivered the opinion of the State Court certainly could not have read the whole of the opinion of this Court. The paragraph thereof quoted above must have escaped his attention.

Recurring to the inaccuracy of Mr. Justice Woods noted above in omitting the word "clearly" so that it reads "unless it appears by the will that the devisor intended to convey a less estate," whereas it should have read "unless it *clearly* appear," &c., it is quite enough to say that the opinion of this Court was not in the least affected by the error.

This appears not only from the view which the Court took of the meaning of the testator, but also from the nature of the word "clearly" as was said in *Brimmer v. Sohier*, 1 Cush., 132, where the same word was used in a similar statute: "It is not supposed that the intensives 'clearly and manifestly' as in this section can have any well defined or precise effect in the construction of wills. They are too vague and indeterminate to form a rule of much practical use. The statute requires undoubtedly that the intention of the testator should be fairly inferrable from the will, but it does not require an express declaration."

It may not be amiss to say that Judge Maxwell does not examine the reasons for the opinion of this Court nor the cases cited in it. These cases were *Smith v. Bell*, 6 Peters, 68, (1832), and *Branot v. Virginia Coal & Iron Co.*, 93 U. S., 320, (1876), not to mention *Green v. Hewett* in the Supreme Court of Illinois. The judgments of this Court were decisive of the question, and left nothing in *Giles v. Little* but the application of the principle laid down in them. And of the three cases cited by Judge Maxwell this may be said, that the second and third do not rest upon the principle asserted by him, while the first is not well considered nor did it necessarily involve this question.

The statute cited by Judge Maxwell in respect of the use or omission of the word "heirs" did not change the common law. Indeed the clause cited by him from Jarman shows this: That author there states that before

1838, when the English statute was passed, any expression, however informal, which denotes the intention to devise the fee will answer for the word heirs.

This was held in *Clark v. Bever*, 139 U. S., 96. The statute of Iowa provided that stockholders of corporations should be held liable for unpaid installments of their stock. Green took the stock of a company at twenty-five per cent. in payment of his debt, and the question was whether he was liable for the seventy-five per cent. remaining unpaid. This Court held that he was not, but several cases in the State Courts were cited as concluding the question here. Mr. Justice Harlan dealt with that contention at page 116 and, after finding that the statute was simply an enactment of the general rule, said that "the decisions of the State Courts are not, therefore, to be regarded as resting upon a local statute, but only as expressing the views of that tribunal in respect to the same principles of general law announced by this Court, after the fullest consideration in the numerous cases to which (we) (he) had referred."

For the several reasons stated above we submit that this Court should adhere to the construction which it gave this will in 1881 in *Giles v. Little*, 104 U. S., relying upon which the plaintiff purchased the premises.

THIRD POINT.

The plea of the Statute of Limitation can not be sustained. Upon the construction of the will given by this Court, Mrs. Dawson had the right of posession until her

marriage with Pickering, on the 14th of December, 1879. Neither the testator's children nor their grantees had any right of action before that day. This action was brought on the 11th of June, 1877, a little more than seven years before the cause for it accrued. The Statutes of Limitation in such cases is ten years. Section 6 of Title. II, of the Code of Civil Procedure, Comp. Laws of 1887, p. 741, provides that "an action for the recovery of the title or possession of lands, tenements or hereditaments can only be brought within ten years after the cause of such action shall have accrued."

FOURTH POINT.

No plea to the jurisdiction having been interposed, it was not necessary for the jury to find the citizenship of the parties.

J. M. WOOLWORTH,
L. C. BURR,
Of Counsel for Deft. in Error.

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APR 11 1892
JAMES H. McKENNEY,
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Supreme Court of the United States.

ARTEMUS ROBERTS, PLAINTIFF IN ERROR,

vs.

WALTER F. LEWIS, DEFENDANT IN ERROR.

Brief of Defendant in Error in Answer to Supplemental Brief of Plaintiff in Error, Filed March 31, 1892.

JAMES M. WOOLWORTH,
LIONEL C. BURR,
Of Counsel for Defendant in Error.

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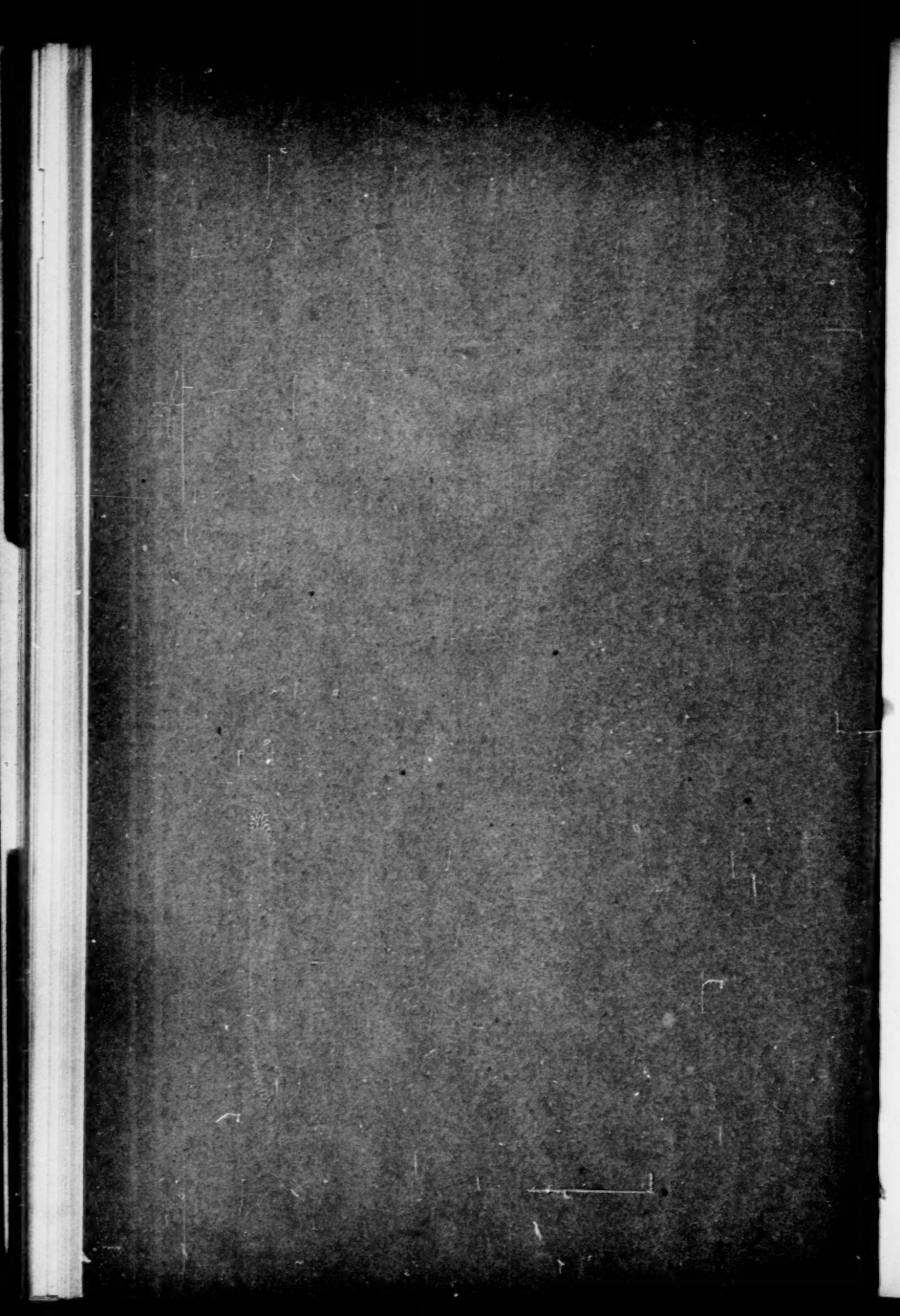

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In addition to the cases cited in support of the second point in our brief we add Carroll County *vs.* Smith, 111 U. S., p. 556, which was a case brought on bonds issued by the county. The defense made was that the bonds had not been issued in conformity with the requirements of the State constitution, and a construction of that constitution was necessary. This Court declined to follow the decision of the supreme court of Mississippi in the construction of its own constitution, and in its opinion lays down the following doctrine:

"The decision in Hawkins *vs.* Carroll County, above re-
"ferred to, is not a judgment of the supreme court of Mis-
"sissippi construing the constitution and laws of the State
"which, without regard to our own opinion upon the ques-
"tion involved, we feel bound to adopt and apply to the
"present case. It is a decision upon the very bonds here
"in suit, pronounced after the controversy arose, and be-

"tween other parties. *It was not a rule previously established "so as to have become recognized as settled law, and which, of "course, all parties to transactions afterwards entered into would "be presumed to know and to conform to.* When, therefore, it "is presented for application by the courts of the United "States in a litigation growing out of the same facts, of "which they have jurisdiction by reason of the citizenship "of the parties, *the plaintiff has a right under the Constitution "of the United States to the independent judgment of these courts* "to determine for themselves what is the law of the State "by which his rights are fixed and governed. *It was to that "very end* that the Constitution granted to citizens of one "State suing in another the choice of resorting to a Federal "court. Burgess *vs.* Seligman, 107 U. S., 20 (27, 359). We "have, however, considered the reasoning of the supreme "court of Mississippi in its opinion in the case of Hawkins "*vs.* Carroll County with the respect which is due to the "highest judicial tribunal of a State speaking upon a topic "which it is presumed to have peculiar fitness for a correct "decision; and while we are bound to admit the carefulness "of its examination of the question, we are not able to adopt "its conclusion."

Gibson *vs.* Lyons, 115 U. S., 439, was a case involving a construction of the Pennsylvania ejectment laws, and is a similar action to the one at bar. In that case the influence of State decisions upon local laws in Federal courts was considered, and the principle laid down as follows:

"It is urged by counsel for defendant in error that the "judgment of the supreme court of Pennsylvania in the "ejectment suits in favor of the defendants against the im- "mediate grantors of the present plaintiffs below, referred "to in the eighth finding of fact, if not entitled to the force "of an estoppel as *res judicata*, is at least an authoritative "decision of the highest court of the State upon the law of "the case, which, as it involves only questions of title to "real estate within its territory dependent upon its local "jurisprudence, ought to furnish the obligatory of decision "for the courts of the United States. * * * As a prece- "dent, the decision of the supreme court of the State, though "single, is entitled to peculiar respect, because all questions

" decided arise upon the local law of the State, *but it cannot* " *have conclusive force in the courts of the United States unless it* " *has become a rule of property* (citing Burgess and Carroll " County cases). The plaintiff in error, being a citizen of " New Jersey, *had a constitutional right by virtue of that fact to* " *invoke the jurisdiction of the courts of the United States, and is* " *entitled to their judgment upon his rights* under the laws of " Pennsylvania."

Anderson *vs.* Santa Anna Township, 116 U. S., 356, was the next case in which this question was discussed, and the court, reciting at length the language quoted from Burgess *vs.* Seligman, reaffirmed the principle laid down in that case, and added—

" While the courts of the United States accept and apply " the construction of a State constitution or local statute " upon which the rights of the parties depend, *which has been* " *fixed by a course of decisions in the State court, it is the settled* " *doctrine of this court that rights accruing under one construc-* " *tion will not be lost merely by a change of opinion in the State* " *court, and where such rights have accrued before the State court* " *has announced its construction* the Federal courts, although " leaning to an agreement with the State court, must de- " termine the question upon their own independent judg- " ment."

See also the cases of—

Pease *vs.* Peck, 18 Howard, 595.
Morgan *vs.* Custennius, 20 How., 1.
Bertz *vs.* Muscatine, 8 Wall., 575.

In the supplemental brief of plaintiff in error it is stated that Lewis purchased this property long after he had knowledge of a contrary decision of the district court of Lancaster county, Nebraska. This statement is unfortunate for the plaintiff in error, for that decision is here in this Court in Giles *vs.* Little, 134 U. S., 645. May —, 1887, is the date of the Lewis deed (see p. 5 of the printed record). Date of